**IN THE SUPREME COURT**

**APPEAL FROM THE [COURT OF APPEALS AND WAYNE COUNTY CIRCUIT COURT]**
**[HON. CYNTHIA D. STEVENS , CIRCUIT COURT JUDGE]**

* * * * *

**RONALD M. NASTAL** and
**IRENE NASTAL,** his wife,

*Plaintiffs/Appellees,*

*v*

**HENDERSON & ASSOCIATES INVESTIGATIONS, INC.,** a Michigan corporation, **NATHANIEL STOVALL** and **ANDREW CONLEY,**

*Defendants/Appellants.*

Supreme Court No.: 125069

COURT OF APPEALS NO.: 241200

WAYNE COUNTY CIRCUIT COURT
CASE NO. 00-030589-NZ
HON. CYNTHIA D. STEVENS


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# APPELLANTS' BRIEF ON APPEAL
# ORAL ARGUMENT REQUESTED
# PROOF OF SERVICE

## TABLE OF CONTENTS

Page

## INDEX OF AUTHORITIES

**MICHIGAN CASE LAW**

**MICHIGAN COURT RULES**



**MICHIGAN STATUTES**



**OUT OF STATE JURISDICTIONS**

**LAW REVIEW ARTICLES**

## BASIS OF JURISDICTION AND RELIEF REQUESTED

Appellants appeal the October 23, 2003[1] *unpublished* decision of the Michigan Court of Appeals, docket number 241200 **[Appendix 15a]**. In that decision, the Court of Appeals affirmed, in part[2], the Wayne County Circuit Court's denial of Appellants' Motion for Summary Disposition **[Appendix 13a]**. Specifically, the Court of Appeals ruled that a civil action for stalking may be brought against any private investigator who continues his surveillance activities after the subject discovers he is being followed.

The Supreme Court granted Appellants' Application in this Court's June 3, 2004 Order **[Appendix 35a]**. This Court has jurisdiction pursuant to MCR 7.301(2) which permits the Supreme Court to review by appeal a decision by the Court of Appeals. It is the appellants' position that review by this Court is necessary because the Court of Appeals' decision has created a new cause of action against private investigators, insurance companies, and law firms in the state of Michigan that previously did not exist, and appellants' counsel has been unable to locate any other state with a similar holding.

Appellants argued, and continue to argue, that Michigan's Anti-Stalking Statute, MCL 750.411h, was never intended to apply to private investigation companies who are

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1 The Michigan Court of Appeals issued a second opinion in this case dated October 30, 2003. The new opinion corrected a citation at the bottom of the page six to MCL 338.826. In all other respects, the opinion remained the same. This second opinion is also attached starting at Appendix 22a.

2 The Michigan Court of Appeals reversed the trial's court's denial of Appellants' Motion for Summary Disposition concerning the appellee's claim of negligence. Appellants are, therefore, not appealing that part of the Court of Appeals' ruling. The Court of Appeals held that there was no authority supporting the existence of a common law duty between the parties. In addition, the Court of Appeals created a new cause of action by finding that an issue of fact exists every time an investigation is compromised, on whether the investigators timely left the scene or whether the investigators are considered to be stalking under MCL 750.411h.

engaged in surveillance activities. Rather, stalking laws were enacted to empower victims of domestic violence.

> In 1991, California passed the nation's first laws to make "stalking" a crime. California's actions produced a domino effect and within two years the remaining forty-nine states created the new crime of "stalking." Stalking statutes provide law enforcement officials with a new way to respond to an old problem. Stalking most commonly occurs between people who have been involved in an intimate relationship, particularly in case of domestic abuse, where the victim attempts to flee from the abusive relationship. Stalking also occurs among strangers or mere acquaintances, such as when obsessed admirers stalk public figures or co-workers.

Salame, A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others, 27 Suffolk U L Rev 67 (1993). Appellants contend that the Court of Appeals' decision was in error as under even the most liberal of interpretations of Michigan's anti-stalking laws, the legitimate activity of private investigators is not the conduct the Legislature intended to prohibit through enacting these stalking laws.

Both the trial court and the Court of Appeals agreed that the actions by the appellants initially served a legitimate purpose, but that a genuine issue of material fact as to the surveillance's legitimacy arises whenever the surveillance activities are continued after a subject discovers that he is being followed. Through its ruling, the Court of Appeals has created a new cause of action against law firms, insurance companies, and the private investigation industry. The Court of Appeals' unpublished opinion will effectively cripple the private investigation industry by permitting the subjects of surveillance to file civil actions and/or criminal charges against private investigators anytime the subject discovers they are being followed and the investigator does not "immediately" stop the surveillance.

According to the logic of the Court of Appeals' decision, even if the investigators continue to follow the subject for one second after being discovered, an issue of fact exists on whether this legitimate activity suddenly turns into a claim of stalking. Clearly, this was not the intention of Michigan's legislature.

The Court of Appeals' decision was clearly erroneous and, if left to stand, will cause material injustice. A decision by the Supreme Court on this matter is necessary because the issues raised are questions of first impression and have far reaching effects. The public policy considerations alone mandate a review by the Supreme Court, as the Court of Appeals' unpublished decision will open a floodgate of frivolous litigation against the private investigation industry and the entities who hire private investigators, such as law firms and insurance companies and businesses, who seek to determine the veracity of claims made by plaintiffs. This fear of meritless litigation was recognized by Michigan's Legislature when it specifically **excluded** constitutionally protected activity or conduct that serves a legitimate purpose from the act of stalking. *See* MCL 750.411h(1)(c). This exclusion was enacted by the Legislature to prevent the type of lawsuit that has been filed by the appellee. The potential chaos created by the Court of Appeals' decision was recognized by a majority of jurisdictions when the stalking statutes were first enacted ten years ago:

> Civil liberties experts, as well as some members of the legal community, express concerns that the stalking laws will prohibit otherwise legal behavior. For example, would these laws prohibit investigative reporters from attempting to interview public figures or private detectives from pursuing their business activities? Many states have anticipated these concerns and have added provisions containing explicit exclusions for actions of law enforcers, private detectives, process servers, bail bondsmen, photographers, news reporters, organized protesters, and even attorneys. **Even without**

> **explicit exclusions, the stalking laws in most states would not inhibit the lawful activities of those listed above since these actors would not have requisite intent.**
>
> Many states have attempted to address the problem of encroachment into constitutionally protected behavior, as twenty-nine states have specific exclusions providing that the "course of conduct" which may comprise stalking does not include constitutionally protected activities. Most of these statutes do not define those activities that constitutionally protected activities, verses those activities that are included in the stalking course of conduct. The definition of these acts will likely develop on a case-by-case basis, either as a matter of fact or as a matter of law.

Salame, *supra*.

Because Michigan recognizes surveillance by private investigators as a legitimate activity, appellants request that this Honorable Court find as a matter of law that surveillance activities by a private investigation company, even if they are discovered by the subject, are not the type of activities intended for protection under Michigan's anti-stalking law. It is well settled that subjects of surveillance still have other remedies available against the overzealous private investigator, including claims for invasion of privacy causes of action, claims for assault and battery, and claims for intentional infliction of emotional distress. *Importantly, in this case, the appellee did not allege facts sufficient to support any of those claims and, therefore, had to resort to this erroneous interpretation of Michigan's anti-stalking laws.* Accordingly, immediate consideration by the Supreme Court is necessary to correct the wrong created by the Court of Appeals, as the decision affects not only the private investigation industry as a whole, but the way law firms, insurance companies and businesses can now investigate the legitimacy of claims.

## QUESTIONS PRESENTED

A. **WHETHER MICHIGAN'S LEGISLATURE INTENDED TO CREATE A CIVIL CAUSE OF ACTION FOR STALKING AGAINST PRIVATE INVESTIGATORS WHOSE SURVEILLANCE ACTIVITIES ARE DISCOVERED BY OTHER SUBJECTS.**

Plaintiff/Appellee answers: Yes

Defendants/Appellants answer: No

B. **WHETHER THE LOWER COURTS FINDING THAT APPELLEE ESTABLISHED A PRIMA FACIE CASE OF STALKING AGAINST APPELLANTS BY HOLDING THAT AN ISSUE OF MATERIAL FACT EXISTS ON WHETHER THE COMPROMISED SURVEILLANCE ACTIVITIES OF APPELLANTS COULD CAUSE A REASONABLE PERSON TO FEEL INTIMIDATED.**

Plaintiff/Appellee answers: No

Defendants/Appellants answer: Yes

C. **WHETHER IN THIS CASE OF FIRST IMPRESSION, THE LOWER COURTS ERRED IN FINDING AN ISSUE OF MATERIAL FACT EXISTS CONCERNING WHETHER OR NOT APPELLANTS' SURVEILLANCE OF APPELLEE WAS STILL A LEGITIMATE ACTIVITY ONCE THE SURVEILLANCE WAS COMPROMISED BY THE APPELLEE.**

Plaintiff/Appellee answers: No

Defendants/Appellants answer: Yes

D. **WHETHER IN THIS CASE OF FIRST IMPRESSION THE COURT OF APPEALS ERRED IN FINDING THAT APPELLANTS' PUBLIC POLICY ARGUMENTS WERE IRRELEVANT WITH RESPECT TO THE COURT OF APPEALS' FINDING OF A NEW CAUSE OF ACTION AGAINST PRIVATE INVESTIGATORS FOR THEIR COMPROMISED SURVEILLANCE OF APPELLEE UNDER MICHIGAN'S ANTI-STALKING LAWS?**

Plaintiff/Appellee answers: No

Defendants/Appellants answer: Yes

## CONCISE STATEMENT OF FACTS

### NATURE OF THE ACTION

Appellee Ronald Nastal[3] filed this lawsuit alleging that Appellants' conduct of surveillance turned into the conduct of stalking after he discovered that he was under investigation by the Appellants. The facts related to this matter, actually begin with a previous lawsuit filed by Nastal. In 1998, appellee filed a third party automobile negligence claim against the driver of a semi-tractor trailer which ran through a light and struck his car. The appellee alleged that he suffered a closed-head injury as a result of the collision and he could no longer work. The driver of the semi was insured through Citizens Insurance Company ["Citizens"].[4]

The automobile negligence lawsuit brought by Nastal eventually mediated for $450,000.00 which was much higher than what Citizens initially evaluated appellee's injuries. It was Nastal's contention that as a result of the automobile accident, he was permanently disabled from returning to any gainful employment. Thereafter, Citizens hired the Appellants, HENDERSON & ASSOCIATES, INC. ["Henderson"] to perform background and activities checks on the appellee to verify the serious nature of appellee's claimed injuries. This activity check included surveillance on Nastal. Surveillance of a plaintiff in a personal injury case is a common discovery procedure utilized by civil defendants to verify the validity of the claims of injury made by a plaintiff. Surveillance is also a tool used by insurance companies and employers to investigate the variety of claims that are brought

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[3] Note that Plaintiff/Appellee Irene Nastal's claim is only for loss of consortium. Therefore this application will refer to Appellee Ronald Nastal only.

[4] Citizens was initially a co-defendant in this action. However, the appellee settled with Citizens and an order was entered dismissing Citizens from this case. The claims against Citizens were for negligence and respondeat superior for the actions of Appellants.

against them everyday. As shall be thoroughly analyzed, *infra*, Michigan has long recognized the legitimate purpose behind surveillance techniques by private investigators.

The purpose of the investigation in this case was to assess the level of Nastal's actual activities against his claim of permanent disability. On Citizens' behalf, Penny Judd retained the services of Henderson to perform surveillance on the appellee, as a means to gauge its settlement and litigation positions. Judd testified in her deposition that an activities check is a normal occurrence in the insurance industry in cases that present potentially large exposure. She described her thinking:

> *We were dealing with the situation where we had a $450,000 mediation, which is a substantial sum of money. We were dealing with a situation where we wanted to verify several things and one of them was – and the reason it was referred to the nurse – was to try to get a good handle or better understanding of the injury, and secondly, we wanted to know what [Nastal's] activities were and what he was doing.*

[**Appendix 77a**.]

The scope of the investigation was communicated by Judd to Henderson on June 8, 1999, in the form of an INFORMATION SERVICE REQUEST form [**Appendix 79a**]. On the form, Judd requested an activities check, background/credit report, and surveillance [**Appendix 79a**]. Henderson's owner, Gregory Henderson, confirmed the instructions regarding the scope of the Nastal investigation [**Appendix 103a**]. Henderson testified that with respect to surveillance, the purpose is to document a subject's activities and to determine their level of activity throughout the day [**Appendix 104a**].

Surveillance of Nastal was performed on four occasions: on June 30, July 6, July 8, and July 31, 1999, respectively. The June 30 and July 31 surveillances were slightly eventful and which apparently give rise to this matter. Andrew Conley, a Henderson

investigator and one of the individual defendants in this lawsuit, performed the surveillance on June 30. Conley testified that prior to the surveillance he reviewed the Information-Service Request sheet that contained basic information regarding the subject, Ronald Nastal. Conley was not provided with further information regarding Nastal's condition, other than that he had a "closed head condition." [**Appendix 109a**].

Conley commenced surveillance on June 30, 1999 at approximately 5:50 a.m., in front of Nastal's residence [**Appendix 83a**]. Conley was in his vehicle, equipped with a video camera and a note pad [**Appendix 111a - 112a**]. At approximately 7:08 a.m., Nastal left his home in an automobile and at about 7:55 a.m., Conley noted that Nastal began performing evasive maneuvers in his vehicle [**Appendix 113a**]. Conley continued to follow the appellee and at 8:02 a.m., Nastal arrived at his doctor's office in Ann Arbor and went inside [**Appendix 84a**]. About four minutes later, Nastal emerged from the building, approached Conley's car, accused Conley of following him, and then began shouting obscenities at Conley [**Appendix 114a - 118a**].

Conley informed Henderson that his investigation was compromised, and Henderson ordered Conley to leave and finish his paperwork pursuant to company policy [**Appendix 105a**]. Conley testified that he terminated the surveillance at that time and he drove his car to a nearby lot to complete his report [**Appendix 119a - 120a**]. Several minutes later, the Ann Arbor Police arrived on the scene, having been called presumably by Nastal. Conley told the officer that he was investigating an insurance claim. The officer left the scene without incident [**Appendix 121a - 123a**].

The plaintiff's version of what happened essentially confirms Conley's recollection. Importantly, Nastal testified that he was ***not afraid*** when he approached Conley's vehicle:

Q And you said you actually approached the vehicle?

A Yes.

Q You weren't afraid to do that?

A I wanted to know what he is doing, why he's following me.

[**Appendix 125a**].

The second surveillance was essentially uneventful, except that the police questioned the appellants during their surveillance of the appellee, while in Nastal's neighborhood. On July 6, 1999, Conley was accompanied by a second investigator, Nathaniel Stovall who is also a co-defendant in this lawsuit. Stovall was in his own vehicle. The Westland police reports for that day indicate that the appellee complained that he was being followed; the appellants were never told who called the police. The appellants were not concerned about being questioned by the police, as it is common for the police to approach their vehicles whenever they are conducting surveillance in a small neighborhood. It is typical for neighbors to report a strange vehicle parked on their street. The police approached Conley who informed the officers that he was investigating an insurance claim. Importantly, Conley was not arrested or asked to leave by the police. The appellants stayed in the appellee's neighborhood until 4:40 p.m. [**Appendix 89a**].

The third surveillance, on July 8, 1999, was also uneventful. There were no confrontations with Nastal or the police. However, the first of many "red herrings" also occurred on July 8. Besides the surveillance, Citizens also referred Nastal to Dr. Leon Quinn, a psychiatrist, for an independent medical examination. On July 6, Dr. Quinn conducted his psychiatric evaluation. He opined that the appellee was experiencing depressive illness and there may be more factors contributing to that depression than

simply the automobile accident. Dr. Quinn recommended **to Citizens** that any investigative surveillance on Nastal be terminated because of its "potential to provoke additional symptomatology." [**Appendix 128a - 140a**].

Appellants contend that this fact is a "red herring" because the appellee relies upon this report to allege that the appellants and Citizens had a duty to stop all surveillance activities immediately upon receipt of the report. **Note, appellants never received a copy of this report and there are no allegations that the appellants ever received a copy of this report or that they were notified of the opinions of Dr. Quinn.** The crux of the appellee's case is that Citizens should have immediately instructed the appellants to discontinue their surveillance of the appellee after Citizens learned of the contents of Dr. Quinn's report. However, there is no documentary or testimonial evidence indicating that the appellants were made aware of the contents of Dr. Quinn's report. Moreover, even if the appellants knew the contents of Dr. Quinn's report, there is no such duty under Michigan law that compels a private investigator to automatically stop the surveillance based solely on the opinion of an IME physician.[5]

Appellants conducted a fourth and final surveillance on Nastal on July 31. On this last surveillance, an incident occurred in the parking lot of the Wonderland Mall. The incident involved Nastal, Conley and Stovall. At that time Conley and Stovall were in the parking lot in separate vehicles observing Nastal. At some point during the surveillance, Nastal, while in his vehicle, began driving in circles. From what Stovall observed, it

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[5] The only possible exception is if, for example, the party that contracted with the appellants, Citizens Insurance, advised the appellants to stop the surveillance and the appellants failed to do so. In that situation, Citizens may have a breach of contract claim against the appellants and the appellees may argue that they were third party beneficiaries under this contract. However, there are no facts alleging such a claim.

appeared Nastal was attempting to take down the license plate numbers of their respective vehicles:

> Q I remember [Nastal] driving around in circles in the lot, and I was driving around also. I do not remember him specifically pulling up behind my vehicle and trying to obtain the license plate.
>
> A Let me ask you this: Were you kind of under the impression that he was on to the fact that you guys were trailing him?
>
> Q At that point, we didn't know.
>
> * * *
>
> Q You weren't even under the impression – did this strike you as just normal activity in the parking lot?
>
> A Again, he did not fly up behind my vehicle and slam on his brakes and try to get the plates. I mean, we're talking about just turns around in the lot. This is not a chase, as far as him trying to chase us down. ... it's just normal driving in a lot ... .

[**Appendix 143a - 144a**].

Again, it is clear from the testimony of all involved that: (a) the appellants did not initiate any contact; and (b) neither Conley nor Stovall did anything that could even from the most liberal construction be considered stalking or harassment. Also importantly, it is clear from Nastal's version events that at no point did Conley or Stovall ever act aggressively or in a threatening manner towards Nastal. As Nastal testified in his deposition:

> Q It's fair to say that these individuals never touched you or talked to you or did anything like that; isn't that true?
>
> A It's fair to say that, except the one coming out of, I think it was the Burger King, the first guy.
>
> Q What did he do to you?

A I might have said hi, he might have said hi or I held the door open, we nodded, which I didn't know who he was.

Q But saying hi is not a threatening comment, is it?

A I don't think it's threatening, no, but I couldn't point him out now.

* * *

Q This individual, he didn't approach you, correct?

A No, he didn't approach me. **I approached him,** wanted to know what he's doing, why he's following me.

* * *

Q At any time did you ever tell these guys that they were frightening you or they were doing something to disturb you in any way?

A I wanted to know – I think I asked them, I couldn't swear on it, why are you following me. He rolled down his window, which you couldn't see inside when I approached him, and said I ain't following you. And I might have said bullshit, whatever.

[**Appendix 126a - 127a**]. The July 31, surveillance was the last contact by the appellants with the appellee.

In their lawsuit, Plaintiffs allege that Citizens and Henderson, knowing of Nastal's paranoia, "stalked" and "harassed" Nastal and that Henderson "negligently" let its surveillance of Nastal "become known to him" as a way of pressuring him into settling his underlying auto-negligence lawsuit. [**Appendix 29a - 34a**]. Appellee alleges that Citizens' and Henderson's conduct caused Nastal emotional distress and that he was damaged thereby. Under these facts, taken in a light most favorable to the plaintiff, the defendants filed a Motion for summary disposition, arguing that Michigan's anti-stalking laws are not applicable to the actions of private investigators, as a matter of law.

## PROCEDURAL HISTORY

In the trial court, appellants moved for summary disposition of the lawsuit pursuant to MCR 2.116(C)(7), (8) & (10). Appellants argued that they were entitled to summary disposition as to the entire complaint because appellee's lawsuit lacks legal and factual merit. The plaintiff's complaint alleges that the appellants committed slander, negligently conducted surveillance upon Nastal, and that the surveillance violated Michigan's anti-stalking statutes.[6] [**Appendix 29a - 34a**]. With respect to the stalking count, appellants argued, among other things, that the stalking claims must be dismissed because: (a) the appellants' surveillance of the appellee was a legitimate activity; and (b) an objectively reasonable person who files a personal injury lawsuit would expect to have his activities investigated.

The trial court granted Defendants' motion with respect only to the slander count. [**Appendix 13a**]. The trial court denied Defendants' motion on the stalking claim, finding that a question of fact existed on the issue of whether the appellants were engaged in a "legitimate activity" on the occasions where the surveillance alleged was "compromised." The trial court also denied Henderson's dispositive motion on the negligence count, finding that a question of fact remained whether Defendants were negligent in continuing the surveillance after it was compromised. Before trial, the appellants filed Leave with the Court of Appeals, arguing that the stalking and negligence claims should have been dismissed as a matter of law. The Court of Appeals granted appellants' application for interlocutory appeal.

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[6] The slander/defamation count was dismissed by the trial court and the negligence count was dismissed by the Court of Appeals. The plaintiff/appellee did not appeal either ruling.

On appeal, it was appellants' position that the trial court's ruling with respect to the plaintiff's anti-stalking and negligence claims in Defendants' motion for summary disposition was incorrect under Michigan's anti-stalking statute and Michigan common law. Moreover, for public policy reasons, the Defendants' motion should have been granted in its entirety because a contrary ruling will have a "chilling effect" on the private investigation industry as a whole. The Court of Appeals agreed with appellant's argument concerning the negligence claims, but disagreed with appellants' position concerning the stalking claim.[7] [**Appendix 15a**]. The Court of Appeals' decision has effectively paralyzed the private investigation industry. If the appellee's claims are not dismissed in their entirety, the lower court's ruling will have an untoward negative effect on a person's or business' right to investigate the legitimacy of claims brought against them in this state. It is well settled that surveillance is necessary to uncover fictitious injuries. It is the appellants' contention that even if this legitimate investigation is made apparent to the person being investigated, the result cannot and should not be an actionable cause of action under Michigan's anti-stalking statute.

In its **June 3, 2004** Order, this Court granted appellants' application for leave to appeal to resolve this matter [**Appendix 35a**].

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[7] The Court of Appeals held that there was no common law duty between the parties and therefore, the appellee's negligence claim fails as a matter of law. However, the Court of Appeals agreed with the trial court, holding that a material issue of fact exist on whether the appellants' continued surveillance of the Nastal, after their investigation was discovered, amounts to stalking under Michigan's anti-stalking statue. The Court of Appeals' decision was unpublished. [Appendix 15a].

## CONCISE ARGUMENT

### I. STANDARD OF REVIEW

The issue presented to this Court is whether a private investigation done for a legitimate purpose can ever rise to the level of stalking as contemplated under Michigan's anti-stalking law as codified at MCL 750.411h. One of the central issues in this case is whether the appellants' surveillance activities can be construed to fall under the term "legitimate purpose " as intended by Michigan's legislature. Questions of statutory interpretation are reviewed de novo. Oade v Jackson Nat's Life Ins Co, 465 Mich 244, 250; 632 NW2d 126 (2001). Moreover, a review of a trial court's decision to grant or deny a motion for summary disposition pursuant to MCR 2.116(C)(10) is de novo. Beaudrie v Henderson, 465 Mich 124 129; 631 NW2d 308 (2001). This Court is being asked to decide, as a matter of law, whether it is reasonable for a person who files a personal injury lawsuit to feel intimidated through the actions of a private investigator, who while acting within the scope of their employment, conducts surveillance on the person even after the surveillance is discovered by the subject.

### II. SURVEILLANCE ACTIVITIES OF PRIVATE INVESTIGATORS CAN NEVER ARISE TO THE CRIME OF STALKING, EVEN IF THE SURVEILLANCE IS DISCOVERED BY THE SUBJECT, AS LONG AS THE PRIVATE INVESTIGATOR IS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT

The plaintiff's entire case can be boiled down to one simple issue, does the legitimate activity of surveillance by a private investigator, cease to remain legitimate and thus rise to the level of stalking under Michigan law, if the surveillance is continued for any amount of time after the surveillance is discovered by the subject. The trial court and the Court of Appeals determined that once a surveillance is compromised and the investigator remains within the sight of the subject, then the issue of whether this previously legitimate

activity has suddenly turned into the illegal act of stalking is an answer left only for a jury. It has been the appellants' contention throughout this litigation that a private investigator's surveillance activities can **never** rise to the level of stalking, even if that surveillance is continued after it has been compromised by the subject. The appellants respectfully request that this Court find as a matter of law that it was never the intention of the Michigan Legislature to subject the activities of private investigators, acting within the scope of their profession, to Michigan's anti-stalking laws.

### A. MICHIGAN'S LEGISLATURE DID NOT INTEND TO CREATE A NEW CIVIL CAUSE OF ACTION CONCERNING THE SURVEILLANCE ACTIVITIES OF THE PRIVATE INVESTIGATORS AS CONDUCT WHICH MAY BE PROHIBITED UNDER MICHIGAN'S ANTI-STALKING LAWS

The primary goal of judicial interpretation of statutes is to discern and give effect to the intent of the legislature. To do this requires review of the statutory text adopted by the Legislature. House Speaker v State Administrative Board, 441 Mich 547, 567; 495 NW2d 539 (1993). If unambiguous, the Legislature will be presumed to have intended the meaning expressed, and the courts enforce that meaning without further judicial construction or interpretation. Grievance Administrator v Underwood, 462 Mich 188, 193-194; 612 NW2d 116 (2000). In this case, the clear meaning behind Michigan's Anti-Stalking laws concludes that they were not to apply to surveillance activities conducted by private investigation companies.

According to MCL 750.411h (1)(e), stalking is defined as a "**willful course of conduct** involving **repeated or continuing harassment** of another individual that would **cause a reasonable person to feel** terrorized, frightened, intimidated, threatened, **harassed**, or molested, and that **actually causes the victim to feel**, terrorized, frightened, intimidated, threatened, **harassed**, or molested. The House Legislative Analysis Section

on MCL 750.411h clearly defines the type of behavior that the stalking laws[8] were enacted to prevent:

> Incidents of stalking behavior commonly receive media attention when celebrities are involved. There are many examples of famous entertainers who are victimized by obsessed fans who follow them, invade their privacy, repeatedly write or call them, and even break into their homes. Celebrities are not the only targets of stalking, however, nor is stalking particularly unusual; it occurs in communities all over the country. According to one report, one in 20 adults will be stalked in his or her lifetime, and up to 200,000 people exhibit traits consistent with those of a stalker.
>
> Stalking often involves **a former spouse or boyfriend or girlfriend** who maliciously follows, harasses, and intimidates the ex-mate or friend, and even members of the victim's family. Sometimes, however, the stalker is a stranger or passing acquaintance **who has become obsessed, often sexually obsessed,** with the object of his or her attention. The threat of violence, real or perceived, is almost always present in such cases; tragically, it is far from unheard of for a pattern of stalking to end in the stalker killing the stalked.
>
> Stalking victims testifying about their predicaments report a multitude of shortcomings of the criminal justice system in dealing with incidents of stalking. Sometimes the problem is getting the police or the courts to respond, and sometimes the problem is the brevity of incarceration or institutionalization, but often the root of the problem appears to be a failure of statute to criminalize stalking behavior that may be carefully maintained within the letter of the law as it now stands. A stalker, particularly one who has already had brushes with the criminal justice system, may be careful not to trespass, not to violate the terms of a court order forbidding contact, not to indulge in behavior that may be witnessed by others. What is done, however, whether it is loitering near a victim's home, repeatedly driving by, showing up a the victim's place of business, or any of a wide variety of ways of showing oneself or monitoring the victim, often is easily recognizable by both

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[8] The growth of anti-stalking legislation began in the early 1990s. Prior to the enactment of anti-stalking laws, civil remedies in the form of an injunction or restraining order were the primary options available to victims of stalking. Comment, Michigan's New Anti-Stalking Laws: Good Intentions Gone Awry, 1994 Det C.L Rev 157 (1994).

> victims an third parties as harassing and intimidating behavior. What is needed, many say, are statutes that are specifically aimed at stalking behavior and the special problems and circumstances surrounding it. California has criminalized stalking behavior and at least two dozen other states are reported to be considering anti-stalking legislation. Many believe that Michigan, too, should criminalize stalking and provide specific civil remedies for victims of stalking.

House Legislative Analysis, HB 5472 and HB 6038, January 4, 1993. [**Exhibit A**, House Analysis]. Nowhere in the analysis of this statute was it contemplated by the Legislature to include surveillance conducted by private investigators as potential criminal behavior under Michigan's anti-stalking laws.

MCL 600.2954 creates a civil cause of action for victims of stalking as defined by the criminal stalking statute, MCL 750.411h. It is this statute that the appellee relies upon to bring this cause of action against the appellants. According to MCL 600.2954, civil remedy is available even if the individual who is alleged to have engaged in stalking has been charged or convicted under MCL 750.411h.

Importantly, in this case, the appellants were neither charged nor convicted of the criminal act of stalking. The appellee never even filed a complaint of stalking with the police department. Not insignificant is the fact that on two of the three occasions that the appellee contends that the appellants were "stalking," the police were on the scene.[9] Even though the police interviewed the appellants, in all instances they did not find facts sufficient to charge the appellants with the crime of stalking.

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[9] According to the plaintiff, he called the police during the first surveillance while in Ann Arbor and he called the police a second time when the appellants were watching his home.

Appellants' counsel could find only one opinion[10] involving a **civil** claim under Michigan's anti-stalking laws. In Leighton v Zeigler, unpublished opinion per curiam of the Court of Appeals, decided [November 22, 1996] (Docket No. 187747), the plaintiff claimed that she was stalked by the defendant. Testimonial and circumstantial evidence presented at trial revealed that the defendant was responsible for placing dead animals on and near the plaintiff's car and throwing raw chicken parts on the balcony of the plaintiff's apartment. The Court of Appeals agreed that these facts were sufficient to constitute stalking under MCL 600.2954 [**Exhibit B**, unpublished opinions]. The facts in this case, involving the legitimate activity of surveillance by private investigators, do not compare with the *Leighton* facts. It is evident when reviewing the criminal cases of stalking and this civil case, that the conduct prohibited by Michigan's anti-stalking statutes is inapposite to the surveillance activities alleged by appellee. Accordingly, this Court should find as a matter of law, that the appellee's claim of a violation under Michigan anti-stalking statute is inapplicable to the facts of this case, as surveillance activities by private investigators are not the types of stalking conduct prohibited under the statute, as contemplated by the Michigan legislature.

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[10] Actually there are two unpublished decisions referencing MCL 600.2954. However the other opinion, Pepperman v General Motors Corp, unpublished opinion per curiam of the Court of Appeals [decided November 4, 1997] (Docket No. 197097) concerned a sexual harassment lawsuit and a stalking injunction which referred to MCL 600.2954 in a footnote. The issue concerned the fact that stalking by definition did not need to have sexual connotations to be actionable. [Exhibit B, unpublished decisions by Court of Appeals]

### B. THE LOWER COURTS IMPROPERLY RULED THAT APPELLEE FULFILLED HIS BURDEN OF ESTABLISHING A *PRIMA FACIE* OF STALKING UNDER MCL 600.2954 AND MCL 750.411H, AS THE CONDUCT BY THE PRIVATE INVESTIGATORS ACTING WITHIN THE COURSE OF THEIR PROFESSION WOULD NOT CAUSE A REASONABLE PERSON TO FEEL HARASSED

According to MCL 750.411h (1)(e), stalking is defined as a "**willful course of conduct** involving **repeated or continuing harassment** of another individual that would **cause a reasonable person to feel** terrorized, frightened, intimidated, threatened, **harassed**, or molested, and that **actually causes the victim to feel**, terrorized, frightened, intimidated, threatened, **harassed**, or molested. It is the appellants' contention, as will be more thoroughly analyzed *infra*, that as a plaintiff in a personal injury lawsuit, it would be unreasonable for the appellee to feel harassed through the legitimate/legal surveillance activities of the appellants; and, therefore, as a matter of law, the plaintiff did not and could not present a *prima facie* case for stalking.

The stalking definition contains three elements. First, stalking requires a willful course of conduct involving repeated harassment of another. Second, stalking requires that the harassment would cause a reasonable person to feel harassed. Third, the harassment must actually cause the victim to feel harassed. *See* People v White, 212 Mich App 298; 536 NW2d 876 (1995).[11] It is appellants' contention that, **as a matter of law**, the surveillance activities of Henderson did not, and could not rise to the level of stalking as defined under MCL 750.411h because the appellants' surveillance activities

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[11] In *People v White*, the criminal defendant made harassing phone calls to his wife. The defendant argued that he had a legitimate purpose for the telephone calls; namely an attempt to reconcile with his wife. This argument was rejected by the Court of Appeals because threatening phone calls are not protected speech. This case is a clear example of the type of actors that Michigan's anti-stalking laws were enacted to protect and the type of conduct that is prohibited.

would not cause a reasonable person to feel harassed and because surveillance is a legitimate activity. Thus, through a plain reading of the statute, the conduct of the appellants, acting within the scope of their employment as private investigators, cannot rise to the level of stalking as a matter of law.

There is little case law in Michigan regarding the reasonableness of surveillance by private investigators; however, other jurisdictions are instructive for the holding that surveillance done during the course of an investigation of a personal injury lawsuit is reasonable. The unfounded nature of the appellee's claim that he felt intimidated or threatened by the appellants' private investigator is illustrated in a holding by the Court of Appeals from the State of Washington. Washington enacted a similar anti-stalking statute to Michigan, but specifically excluded the activities of licensed private detectives from the crime of stalking. In State of Washington v Lee and Yates, 917 P2d 159 (1996), the Court had to determine the constitutionality of the exclusion of a private investigator from the statute as it pertained to the equal protection clause. The court noted that "the statutory exemption for licensed private detectives is presumably based on the Legislature's conclusion that these individuals pose relatively little threat of harm to the people they follow." Id at 168 [**Exhibit C**, out of state case law]. Similarly, this reasoning is applicable to the facts of this case. A reasonable person in the shoes of the appellee would not and could not feel intimidated or harassed by the actions of the private investigators, even after their surveillance was discovered by Nastal. Accordingly, the appellee has failed to establish a prima facie case of stalking.

The "reasonable person" analysis is critical to this Court's determination of this issue. It is well settled that the reasonable person standard has been carefully crafted to

formulate one standard of conduct for society. This standard demands an external and objective form of conduct, rather than the individual judgment of a particular actor. *See* Radtke v Everett, 442 Mich 368 (1993). In previous decisions, this Court has held that once a standard of conduct is established, the reasonableness of an actor's conduct under the standard is a question for the fact finder, **unless**, on the basis of the evidence presented, reasonable minds could not differ. Jackson v Saginaw County, 458 Mich 141, 146-47; Vermilya v Dunham, 195 Mich App 79, 83; 489 NW2d 496 (1992). Here, where the Court of Appeals erred was finding that a reasonable person [as a plaintiff in a personal injury or worker's compensation lawsuit] could have feelings of being harassed while under surveillance by a private investigator hired by an insurance company or counsel defending the lawsuit. The answer to this issue is not a question for a jury.

The State of Pennsylvania has also provided some analysis on this issue. In Foster v Manchester, 189 A2d 147 (Pa Supreme Court 1963), the detectives employed by an insurance company assigned a team of two men to take video of a plaintiff for possible use in litigation. The allegations included following the plaintiff very close behind in traffic causing her to become extremely nervous and upset so that she required medical treatment. The court stated:

> . . . by making a claim for personal injuries [plaintiff] must expect reasonable inquiry and investigation to be made of her claim and to this extent her interest in privacy is circumscribed. It should be noted that all of the surveillance took place on public thoroughfares where [plaintiff's] activities could be observed by passers-by. To the extent [plaintiff] has exposed her self to public observation and therefore is not entitled to the same degree of privacy that she would enjoy within the confines of her own home.
>
> Moving to the question of whether [the detectives'] conduct is reasonable we feel that there is much social utility to be gained

> from these investigations. It is in the best interests of society that valid claims be ascertained and fabricated claims be exposed.

Id at 150 [**Exhibit C**]. These facts are similar to the plaintiff's version of events in the present, only less innocuous. Thus, this court should find as a matter of law that a reasonable person [who files a personal injury lawsuit] cannot and could not feel harassed by the surveillance activities of the appellants and, therefore, appellee cannot make out a prima facie claim of stalking as a matter of law.

Similarly, in Johnson v Corporate Special Services, Inc, 602 SO2d 385 (Supreme Court of Alabama[12], 1992), a plaintiff filed a claim for disability and an insurance company hired the defendant private investigation firm to investigate the validity of the plaintiff's claim. The investigator parked outside the plaintiff's house to observe the plaintiff's outside activity [identical facts as the present case]. At no time did the investigators attempt to observe the plaintiff inside his house, but the plaintiff still brought an invasion of privacy cause of action. The court held that the defendant had a legitimate purpose for its investigation and that "plaintiffs in a personal injury claims must expect reasonable inquiry and investigation to be made of their claims." Id at 385 [**Exhibit C**].

It has been the appellants' contention throughout, that, as a matter of law, the appellee's feelings of being harassed by Henderson's surveillance were not reasonable. In support of this position, appellants argue that as a plaintiff in a personal injury lawsuit,

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[12] In another Alabama case, the court held that surveillance conducted by a private investigation company was legitimate and the subject of the surveillance should have expected a reasonable investigation of his injury. In ICU Investigations, Inc v Jones, 780 So2d 685 (Supreme Court of Alabama, 2000), the plaintiff's employer hired the defendant investigation company to watch the plaintiff's daily activities. The key issue in the plaintiff's worker's compensation case was the extent of his injury. The plaintiff sued the investigation company for invasion of privacy. The Supreme court held that plaintiffs making a personal injury claim must expect reasonable inquiry and investigation to be made of their claims and that to this extent their interest in privacy is circumscribed. Id at 689.

it is reasonable to expect that the defendant will conduct surveillance to investigate the legitimacy of the plaintiff's claims. A defendant's right to investigate a claim is reasonable. Cruz v State Farm Mut Auto Ins Co, 466 Mich 588, 597; 648 NW2d 591 (2002). Moreover, a defendant's duty to refrain from intrusion into another's private affairs is not absolute in nature, but rather is limited by those rights which arise from social conditions including the business relationship of the parties. Lewis v Dayton-Hudson Corp, 128 Mich App 165, 169; 339 NW2d 857 (1983). It is well settled that a defendant has a right to investigate matters that are potential sources of legal liability. Early Detection Center, PC v New York Life Ins Co, 157 Mich App 618, 630-631; 403 NW2d 830 (1986).

Under the lower courts' rulings, this right is effectively circumvented by the appellee's claim that such investigation may amount to stalking, anytime a subject discovers that he is under surveillance. Clearly, through the Legislature's adoption of a reasonable person's standard, the appellants' conduct with respect to their surveillance activities was intended to be exempted from Michigan's anti-stalking laws. Accordingly, this Court should rule as a matter of law that a plaintiff who has filed a personal injury cannot have any reasonable feelings of being harassed simply because he discovers that he is under surveillance by a private investigator.

### C. APPELLANTS' SURVEILLANCE OF APPELLEE, EVEN AFTER IT WAS COMPROMISED, WAS A LEGITIMATE ACTIVITY AND THEREFORE IS EXCLUDED AS CONDUCT EXCLUDED UNDER MICHIGAN'S ANTI-STALKING LAWS

The applicability of Michigan's stalking statute to an individual defendant hinges on the definition of harassment. The crime of stalking requires a willful course of conduct involving repeated **harassment** of another. MCL 750.411h defines harassment as:

> conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a **reasonable individual** to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include **constitutionally protected activity or** conduct that serves a **legitimate purpose.**

This definition of harassment can be broken down into three elements. First, the harassment must be directed towards a victim. Second, the conduct includes repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress. Third, harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose. *See* People v Kieronski, 214 Mich App 222 (1995).[13] It is appellants' contention that, **as a matter of law**, the surveillance activities of Henderson did not, and could not rise to the level of harassment as defined under MCL 750.411h(1)(c) because their surveillance activities would not cause a reasonable person to feel harassed and because surveillance is a legitimate activity. Thus, through a plain reading of the statute, the conduct of the appellants, acting within the scope of their employment as private investigators, cannot rise to the level of stalking as a matter of law.

The Michigan legislature, in order to prevent the type of litigation at issue in this case, excluded certain conduct from being subject to anti-stalking laws. The statute specifically exempts constitutionally protected activity and the legislature also included a broad catchall with the terms "conduct that serves a legitimate purpose." MCL 750.411h (1)(c). Surveillance easily fits within this exclusion, as the conduct is part of the judicial function of the truth seeking process of litigation.

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[13] In *People v Kieronski*, the Court of Appeals held that the criminal defendant's conduct was not exempted under the harassment definition because, although he claimed to have legitimate business at the public places, the court could not discern any legitimate purpose in approaching and threatening the victim in those public places. Again, this criminal conduct is inapposite to the conducted alleged by the appellee in this case.

Surveillance by private investigators acting within the scope of their employment is a legitimate activity excluded under Michigan's Anti-Stalking laws. Moreover, there are no cases directly on point addressing this issue. Appellants' position that legitimate activities such as surveillance cannot rise to the level of stalking is further supported by stalking statutes in other jurisdictions.[14] For example, in Nevada, a person who, without lawful authority, willfully or maliciously engages in a course of conduct that would cause a reasonable person to feel harassed and that actually causes the victim to feel harassed, commits the crime of stalking. However, stalking does not include acts which are otherwise protected or authorized by constitutional or statutory law, regulation or order of a court, including:

> The activities of a person that are carried out in the normal course of his lawful employment.

Nevada Revised Statutes § 200.575.6.(e)(3) [**Exhibit D**].

These broad catch-all exclusions are intended to exclude the type of claims made by appellee. The appellee discounts this argument, not with case law supporting a different position, but with an unsupported generalization that the appellants' position will provide private investigators with unlimited discretion in carrying out their surveillance. This position is simply not true. Private investigators are still bound by common law claims of assault and battery, invasion of privacy, and intentional infliction of emotional distress, along with the parameters of the Private Detective License Act of 1965, MCL 338.821, *et al*, whenever these investigators conduct surveillance or other activities outside the scope of their profession.

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[14] Under Tennessee law, stalking shall not be construed to prohibit following another person during the course of a lawful business activity. Tenn Code Ann § 39-17-315(c). [Exhibit N].

It is the appellants' request that this Court find as a matter of law that the activities of private investigators are excluded under Michigan's Anti-Stalking laws. In fact, several states specifically exclude the profession of private investigator or individuals engaged in the course of any lawful business activity, from prosecution under the anti-stalking statutes. For example, in Delaware, stalking is defined as a course of conduct directed toward a specific person which would cause a reasonable person to fear physical injury and whose conduct induces such fear. *See* 11 Del C § 1312A [**Exhibit D**, Out of State Statutes]. The statute goes on to hold:

> This section shall not apply to conduct which occurs in furtherance of legitimate law enforcement activities or to private investigators, security officers or private detectives as those activities are defined in Chapter 13 of Title 24.

11 Del C § 1312A(d) [**Exhibit D**]. Similarly, the North Dakota Legislature specifically exempted private investigators from claims of stalking. The statute states:

> In any prosecution under this section [§ 12.1-17-07.1 Stalking], it is a defense that a private investigator licensed under chapter 43-30 or a peace officer licensed under chapter 12-63 was acting within the scope of employment.

North Dakota Cent Code, § 12.1-17-07.14 [**Exhibit D**]. An analogous provision can also be found under Washington law. Under Rev Code Wash (ARCW) § 9A.46.110:

> It shall be a defense to the crime of stalking that the defendant is a licensed private investigator acting within the capacity of his or her license as provided by chapter 18.165 RCW.

Rev Code Wash (ARCW) § 9A.46.110(3) [**Exhibit D**].

These states have specifically excluded the conduct which the Court of Appeals improperly ruled to be a cause of action under Michigan's anti-stalking law. These examples from out of state jurisdictions support the appellants' argument that private

investigators, acting within the scope of their profession, must, as a matter law, be specifically excluded from prosecution under anti-stalking laws.

The appellants' conduct is specifically not classified as stalking in the states of Delaware, North Dakota, and Washington and likewise was not intended to be prohibited in the state of Michigan. This fact is evidenced by the Michigan Legislature's use of the language exempting "conduct which serves a legitimate purpose." MCL 750.411h(1)(c). The appellants' position is further supported by the few published decisions regarding Michigan's anti-stalking laws, *infra*, which conclusively demonstrate that the surveillance activities of private investigators are not the types of conduct that the Legislature intended to prohibit.

Michigan's anti-stalking statute is clear that a person cannot be engaging in stalking if he is performing a constitutionally protected activity or conduct that serves a legitimate purpose. *See* MCL 750.411h(1)(c). Constitutionally protected activity or conduct that serves a legitimate purpose is expressly excluded from the statutory definition of stalking. See People v Coones, 216 Mich App 721 (1996).[15]

Michigan cases are clear that surveillance is, in and of itself, a legitimate activity. Moreover, there are no allegations that appellants engaged in any illegal conduct while conducting surveillance of plaintiff. As surveillance serves as a legitimate purpose, this Court should find that a stalking claim can never exist against a private investigator acting legally and within the scope of his profession. The issue of surveillance has been most

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[15] In *People v Coones*, the criminal defendant argued that he did not harass the victim because he acted with the legitimate purpose of communicating with his wife to preserve his marriage. The Court of Appeals rejected this argument, finding that the defendant's conduct was illegitimate because it was in violation of a restraining order and the conditions of the defendant's bond. Clearly that conduct is in no way related to the allegations of the appellee in this case who simply contends that the appellants did not "timely" terminate their surveillance, once it was discovered.

often addressed in cases alleging invasion of privacy. The Court of Appeals' holding in Saldana v Kelsey-Hayes Co, 178 Mich App 230; 443 NW2d 382 (1989), is highly instructive with respect to the legitimacy of surveillance activities.

In *Saldana*, the plaintiff's employer suspected the plaintiff of falsely alleging he was injured in a bicycle accident at work and the employer suspected that the plaintiff was malingering. The employer hired a private investigation firm to conduct surveillance on the plaintiff. As part of this investigation, the firm followed the plaintiff around his home, took photographs with a zoom lens through his home's windows and posed as a process server for the purposes of having the plaintiff answer his door and thus allowing the investigator to look around the plaintiff's home. The investigator also submitted a letter to the plaintiff's physician asking for records pertaining to the plaintiff's injuries.

Based upon this investigation, the employee filed a lawsuit alleging, among other things, intrusion upon seclusion, solitude or into private affairs. Id at 233. The Court of Appeals affirmed the trial court's dismissal of the plaintiff's action on summary disposition. The court held that the plaintiff had failed to ". . . allege facts that show the intrusions were into matters which the plaintiff had a right to keep private." Id at 234. More specifically, the court concluded:

> The defendants' duty to refrain from intrusion into another's private affairs is not absolute in nature, but rather is limited by those rights which arise from social conditions, **including the business relationship of the parties** [citation omitted]. Defendants' surveillance of plaintiff at his home involved matters which **defendants had a legitimate right to investigate**. Thus, in *Earp v Detroit*, [16 Mich App 271; 167 NW2d 841 (1969)], this Court recognized the right of the defendant employer to engage in investigation of an employee suspected of illegality committed in the course of employment. Also significant to the delimitation of the scope of privacy is whether the circumstances give rise to an expectation of privacy

> from the standpoint of the plaintiff. [citation omitted]. Plaintiff's privacy was subject to the legitimate interest of his employer in investigating suspicions that plaintiff's work-related disability was a pretext. We conclude that plaintiff does not meet the second requirement of the intrusion into seclusion test."

Id at 234-35.

From the holding in *Saldana* it is clear that surveillance pursuant to a claims investigation is a legitimate activity. The Court of Appeals also recognized that individual rights of privacy may be required to yield to an employer's, or in this case the insurance company's, more paramount legitimate business interest to investigate the employee's suspected illegality. In this case, appellee cannot reasonably argue that he had legitimate privacy expectations in two public places where he ultimately confronted the appellants. Juxtaposed against the facts of *Saldana* where the investigators in that case used subterfuge to actually look inside the plaintiff's home, in this instance appellants' conduct is even less controversial.

In the present action, both the trial court and the Court of Appeals agreed that the surveillance actions by appellants initially served a legitimate purpose [**Appendix 15a**]. However, the lower courts also held that an issue of fact exists on the legitimacy of these surveillance activities, once Henderson's surveillance activities continued, after Nastal discovered that he was being followed. Their ruling presumably was based, in part, on the testimony of the appellants stating:

> Q Do you recall that it was desirable, at least, that when you conduct a surveillance that the people you were watching not know that you were watching them?
>
> A Of course.
>
> Q And you knew that without someone telling you that, right?

A Of course.

Q Why?

A When you perform a surveillance you're not going to be able to observe anything – how do I want to put this – naturally what they're doing. Basically all you're doing is observations of people you follow.

Q Okay. And you want them to –

A Act naturally.

Q You want to know what they're doing, irrespective of the fact that you're behind them?

A Right.

Q You don't want that to affect their activity, right?

A Correct.

Q You want to have a good picture of exactly what they do and what they don't do, right?

A Correct

[**Appendix 107a - 108a**] Conley's boss, Greg Henderson also testified:

Q And was there ever any type of occurrence with you and Mr. Conley wherein that surveillance was compromised?

A I don't recall specifically, but I'm sure there has been.

Q So we're clear, compromised – well, what does compromised mean to you?

A Generally means that the person we're following is somehow made aware that we're there or suspects we're there.

Q Okay. What is the procedure after an investigation or after a surveillance has been compromised?

A If it's absolutely compromised and there's contact or any words exchanged, it's terminated.

Q This is something that Mr. Conley and Mr. Stovall would have been told?

A Yes.

Q Why would it be terminated?

A Because it serves no purpose to continue.

Q Once a surveillance has been compromised, there's no legitimate purpose you can think of to further surveil [sic] that person?

A I'm not saying that, no.
Q What are you saying?

* * *

Q What are you saying?

A There is a purpose. If somebody's going someplace that we need to get to with them and that end result obviously has a purpose, and if we have to get to that point, you know, and we deal with this type of situation, then yeah, I will continue on if – depending on the client, depending on the entire circumstances.

[**Appendix 102a - 103a**]. Based on this testimony, the appellee, the trial court and the Court of Appeals all concluded that an issue of fact suddenly materialized as to whether the appellants' previous legitimate conduct turned illegitimate.

This is the appellee's only documentary evidence to support its stalking claim and it is the biggest *red herring* in this case. This testimony in no way concludes that compromised surveillance is illegal or that it no longer serves a legitimate purpose. The appellee contends that the appellants intentionally caused their presence to be known to Nastal for the sole purpose of intimidating him and making him fearful so that he would settle his underlying automobile negligence case for less money [**Appendix 29a**]. The appellee and the lower courts have all misconstrued this testimony to mean that whenever

any private investigator's surveillance is compromised, that previous activity become illegitimate. That is not the testimony nor is that the standard of practice for an investigator. Although it may be easier to catch a malingering plaintiff if he does not know he is being watched, just because he knows he is under surveillance, does not translate into stalking. An analogous example are drug dealers who know that the police are watching them in unmarked vehicles across the street. Also, an investigative reporter who is tracking a story and who is discovered by the subject, does not suddenly become a stalker if he decides to confront the subject on more than one occasion to get a comment. Likewise, just because the subject knows he is being watched does not mean that the surveillance is worthless.

Moreover, simply because a subject discovers that he is under surveillance, which a reasonable person who files a personal injury lawsuit would expect, does not turn this legitimate activity into a stalking claim just because the investigators did not immediately terminate the surveillance fast enough for the appellee. The fact that the surveillance took place in public; that surveillance itself is legitimate as a matter of law; the fact that a reasonable person would expect to be under surveillance when they file a personal injury lawsuit; and the fact that Michigan's Legislature did not intend to prohibit legitimate surveillance activities by private investigators, conclusively demonstrates that the appellee does not have a cause of action under Michigan's anti-stalking laws.

Again, because Michigan jurisprudence is limited with respect to causes of action against private investigators, other jurisdictions are useful in resolving this matter. In Figured v Paralegal Technical Services, Inc, 555 A2d 663 (Superior Court of New Jersey, 1989), the plaintiff filed an action against defendant investigators for invasion of privacy and emotional distress. The investigators had been retained by an insurance company after the plaintiff was in an automobile accident and claimed she was severely injured. The court

held that an individual who sought to recover damages for the alleged injuries had to expect that the claim would be investigated. The actions by the defendant investigators are strikingly similar to the appellants in this case:

> . . . defendants drove past her home, and were seen to do so, on several occasions on one day; that they parked their cars about half a mile from her home and stared at her as she drove past them; that they followed her on a public street to a store; and that after she parked in the store's parking lot, one defendant walked slowly around her car and stared her straight in the face. She also asserts that she was followed on Route 380 in Pennsylvania, and that when she stopped at a rest area the investigators did so as well. These allegations do not include acts which involve an unreasonable intrusion upon plaintiff's seclusion. Rather, the defendants' activities all took place in the open, either on public thoroughfares or in areas where members of the public had the right to be. As noted by Judge Haines in Schaefer, supra, [NOC, Inc v Schaefer, 197 NJ Super 249 (Law Div 1984)] "Bisbee supports the proposition that whatever the public may see from a public place cannot be private." 197 NJ Super at 255, n 1.
>
> An individual who seeks to recover damages for alleged injuries must expect that her claim will be investigated. Although the investigation must be reasonably conducted, and may not involve an intrusion into the privacy of the claimant which could be deemed highly offensive to a reasonable person, we conclude that here, even giving plaintiff the benefit of all legitimate inferences, the facts submitted in opposition to defendant's motion for summary judgment reveal no objectively unreasonable or highly offensive conduct on the part of defendants.

Id at 666-667 [**Exhibit C**]. Under those facts there were no viable claims against the defendants as a matter of law. Likewise in this case, the plaintiff's allegations taken in a favorable light do not rise to the level of an invasion of privacy claim and cannot rise to the level of a stalking claim. Moreover, the fact that the appellants testified that once the investigation was compromised the surveillance was no longer effective, does not mean that

investigation automatically turned into stalking. There is no support for such a proposition in any jurisdiction in this land.[16]

Another illustration of how activities by private investigators are the types of legitimate behaviors specifically excluded under stalking statutes can be found in the state of New York. New York has a similar anti-stalking statute to Michigan:

> N.Y. Penal Law § 120.45 makes it unlawful to intentionally, **and for no legitimate purpose**, engage in a course of conduct directed at a specific person that would likely install reasonable fear of material physical harm in the target person or that actually causes material mental or emotional harm to the targeted person where the violator knows or reasonably should know that such conduct would elicit the requisite fear or cause the requisite harm.

In New York v Stuart, 742 NYS 2d 767, the criminal defendant argued that New York's anti-stalking statute was unconstitutionally vague because of the term "legitimate purpose." In finding the statute constitutional the New York Supreme Court held:

> The legislative use of the inherently imprecise language does not render a statute fatally vague where, as here, that language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices" [citations omitted]. Further, it does not avail defendant to advance theoretical applications of the term "legitimate purpose" which would be **outside the stalking statute's intended reach, such as the investigatory work of a private detective or the collection efforts of a "repo man."** The insidious actions of this defendant, a stranger to the complainant, were not remotely legitimate in purpose, and "this court cannot consider the possibility that the statute may be vague as applied in other hypothetical situations."

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16 Appellants' counsel performed a Lexis/Nexus search using the terms stalking and private investigators or detectives, and was unable to find a single case in any jurisdiction where a person under surveillance decided to sue the private investigation company for stalking simply because the subject discovered she was under surveillance.

Id at 768 [**Exhibit C**]. This holding, along with the findings in other jurisdictions, supra, lend further credence to the appellants' position that the surveillance activities by private investigators, even after the surveillance has been compromised, can never rise to the level of stalking. It is clear that the Michigan Legislature, though the use of the term "legitimate purpose" specially excluded such activity and appellee's cause of action should thus be dismissed as a matter of law.

However, the lower courts, with their rulings did not believe the statute was clear and instead decided to create a new cause of action. Now, anytime a private investigator's surveillance activities are compromised, it becomes an issue of fact on whether this previously legitimate activity turns into stalking. According to the lower courts' rulings, it will always be an issue of fact on whether the compromised investigator timely terminated the surveillance once the subject notices he is being followed. With this ruling, whether the investigator should have left in 1 second, 1 minute or 1 hour, it does not matter as it will always be up to a jury to determine if this previously legitimate activity of surveillance now rises to the level of stalking. There is simply no basis for this holding in Michigan law, or the laws in any other state, and it is contrary to the legislative intent of Michigan's anti-stalking laws. Accordingly, this Court should rule as a matter of law that the legitimate activity of surveillance, does not become illegitimate simply because the surveillance is compromised.

### D. PUBLIC POLICY CONSIDERATIONS MANDATE A FINDING THAT APPELLANTS' SURVEILLANCE OF APPELLEE DID NOT AND COULD NOT RISE TO THE LEVEL OF STALKING

Finally, from a public policy standpoint, the lower courts rulings essentially are limiting investigators to "one bite at the apple." Thus, any time an investigation is discovered, or in appellee's characterization "compromised," the investigation must cease immediately or a

potential cause of action for stalking would arise at that point. By allowing this cause of action to continue, appellants will essentially be prevented from investigating the validity of personal injury cases for fear of being sued and/or arrested for stalking. This ruling not only affects the private investigation industry, but also the insurance industry and the legal profession, as these two entities are the main purchasers of private investigation services.[17]

Moreover, with this ruling, investigative reporters may also be subjected to frivolous lawsuits based on their surveillance activities. Under the lower courts' rulings, not only will there be an influx of lawsuits against private investigators, but the insurance companies and law firms that hire these private investigators will also be named as parties under a Respondeat Superior theory [similar to Citizens Insurance in this case. [**Appendix 29a**]

Unfortunately, the Court of Appeals' analysis simply glosses over the public policy argument by simply disagreeing that there will be a "chilling effect" on the private investigation industry. In finding that an issue of material fact exists in this case as to why the surveillance was not immediately discontinued when Nastal detected the investigators, the Court of Appeals somehow believes that litigation in this area will be limited to strictly this case and these facts. The Court of Appeals erred in this cursory analysis.

Not only is this holding contrary to the spirit and intent of Michigan's anti-stalking law, but also the ruling will have an effect on the private investigation industry throughout this state, as private investigators will be unclear on how to act whenever their subject spots them. Specifically, the private investigation industry will be concerned on whether this holding means that anytime an investigation is compromised, are the investigators now prevented forever from conducting anymore surveillance on that particular subject? Or, is

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17 For the appellee to contend that the lower courts' rulings do not have an adverse affect on these other industries disingenuous. The appellee needs to look no further than his own complaint against Citizens Insurance on the allegation *Respondeat Superior* for the actions of the appellants. [Appendix 29a]

it that they must now immediately terminate their surveillance [within one second] upon contact with the subject, or face the chance that they will be sued by the subject for stalking?

More importantly, from a public policy standpoint if appellee's lawsuit goes forward the Court is essentially sending the message that mere surveillance is tantamount to stalking. At the very least, the Court will be opening a *Pandora's Box* of lawsuits against private investigation companies and their clients, including insurance companies and law firms, for activities that have been recognized in Michigan as legitimate. In practical effect, the Court will be outlawing all private investigation in the State of Michigan. It is undisputed that the legitimate activity of surveillance does not fall within the statutory definition of stalking and harassment and therefore summary disposition should have been granted as a matter of law by the lower courts.

Furthermore, a business' or insurance company's or defense counsel's legitimate right to investigate claims is severely compromised with this holding. In essence, the lower courts' decisions would transform a private investigator's legitimate activity of surveillance into a potential violation of Michigan's anti-stalking laws, the moment the investigator or investigation is discovered. This decision was not the intended effect of Michigan's anti-stalking laws. For these reasons, this Court must find as a matter of law that appellants were engaged in a legitimate activity, even after the investigation was compromised, and that appellee's claims under Michigan's anti-stalking laws, must be dismissed.

## III CONCLUSION

Finally, a finding by this Court, as a matter of law, that appellee does not have a cause of action under Michigan's anti-stalking laws will not leave potential plaintiffs without any remedy against the rogue private investigator. Importantly, the appellee's complaint

does not allege any facts that the investigators acted in an unreasonable or intrusive or illegal manner [**Appendix 29a**]. Moreover, even if the appellee had alleged that the investigation was held in an unreasonable or intrusive or illegal manner, the cause of action would not be one for stalking, but rather for some other tort such as assault and battery and invasion of privacy.[18] It is well settled that causes of actions based on invasion of privacy will provide potential plaintiffs with causes of action against overzealous private investigators. Saldana, *supra*.

The tort for invasion of privacy can be shown by establishing that a defendant intruded into a matter in which the plaintiff has a right of privacy by a means that is objectionable to a reasonable person. Lewis, *supra* at 169. Importantly, the appellee in this case never made a claim for invasion of privacy, as there were no facts to support such a claim. Likewise, the appellee could have brought a civil claim for intentional infliction of emotional distress by the investigators, but again there are no facts to support such a position.[19] Without any cause of action available at common law, the appellee has brought this frivolous claim of stalking, completely subverting the intended protection of Michigan's anti-stalking law. Nastal's unreasonable reaction to being followed should not be allowed to cripple the entire private investigation industry.

---

[18] As early as 1970, courts in other jurisdictions recognized the tort of invasion of privacy for the overzealous surveillance of people. In Nader v General Motors, 255 NE2d 765 (1970), the plaintiff alleged that the defendant engaged in harassing conduct with the intent of preventing the plaintiff from publishing his book criticizing the safety and design of the defendant's automobiles. The court held that the mere observation of the plaintiff in a public place does not amount to an invasion of his privacy, but surveillance may be so overzealous to render it actionable. Id at 771.

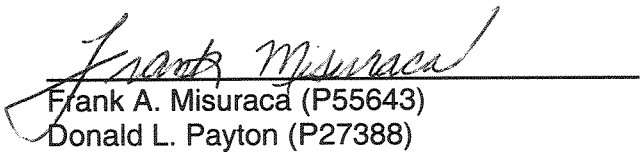
[19] Any such claim for intentional infliction of emotional distress, if such claim existed in the plaintiff's poorly drafted complaint, was dismissed by the trial court. [Exhibits A & I]

## RELIEF REQUESTED

**WHEREFORE** Defendants/Appellants, Henderson & Associates, Inc., Nathaniel Stovall, and Andrew Conley respectfully pray for an order overruling the Court of Appeals and the trial court's denial of Defendant's Motion for Summary Disposition regarding Michigan's Anti-Stalking Laws and dismissing this lawsuit in its entirety.

*Respectfully Submitted,*

**KAUFMAN, PAYTON & CHAPA**



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Date: June 28, 2004

d/f/wpd/Trish/M1060M4[Nastal]/Supreme Court/Brief on Appeal

A

Legislative
Analysis
Section

s Plaza Building, 10th Floor
sing, Michigan 48909
one: 517/373-6466



House Bill 5472 (Substitute H-4)
Sponsor: Rep. Dianne Byrum

House Bill 6038 (Substitute H-1)
Sponsor: Rep. Dianne Byrum

Senate Bill 719 (Substitute H-4)
Sponsor: Senator Robert Geake

First Analysis (9-16-92)
Committee: Judiciary
Senate Committee (SB 719): Judiciary

## *THE APPARENT PROBLEM:*

Incidents of stalking behavior commonly receive media attention when celebrities are involved. There are many examples of famous entertainers who are victimized by obsessed fans who follow them, invade their privacy, repeatedly write or call them, and even break into their homes. Celebrities are not the only targets of stalking, however, nor is stalking particularly unusual; it occurs in communities all over the country. According to one report, one in 20 adults will be stalked in his or her

consistent with those of a stalker.

Stalking often involves a former spouse or boyfriend or girlfriend who maliciously follows, harasses, and intimidates the ex-mate or friend, and even members of the victim's family. Sometimes, however, the stalker is a stranger or passing acquaintance who has become obsessed, often sexually obsessed, with the object of his or her attention. The threat of violence, real or perceived, is almost always present in such cases; tragically, it is far from unheard of for a pattern of stalking to end in the stalker killing the stalked.

Stalking victims testifying about their predicaments report a multitude of shortcomings of the criminal justice system in dealing with incidents of stalking. Sometimes the problem is getting the police or the courts to respond, and sometimes the problem is the brevity of incarceration or institutionalization, but often the root of the problem appears to be a failure of statute to criminalize stalking behavior that may be carefully maintained within the letter of the law as it now stands. A stalker, particularly one who has already had brushes with the criminal justice system, may be careful not to trespass, not to violate the terms of a court order forbidding contact, not to indulge in behavior that may be witnessed by others. What is done, however, whether it is loitering near a victim's home, repeatedly driving by, showing up at the victim's place of business, or any of a wide variety of ways of showing oneself or monitoring the victim, often is easily recognizable by both victims and third

What is needed, many say, are statutes that are specifically aimed at stalking behavior and the special problems and circumstances surrounding it. California has criminalized stalking behavior and at least two dozen other states are reported to be considering anti-stalking legislation. Many believe that Michigan, too, should criminalize stalking and provide specific civil remedies for victims of stalking.

## *THE CONTENT OF THE BILLS:*

Together with Senate Bill 1095 (which is scheduled for consideration by the Senate Judiciary Committee on Thursday, September 17, 1992), the bills constitute a package of legislation to criminalize stalking (House Bill 5472 and Senate Bill 719), authorize warrantless arrests for stalking (House Bill 6038), and authorize anti-stalking court orders and civil lawsuits for damages caused by stalking (Senate Bill 1095). The bills would take effect January 1, 1993, providing all were enacted.

House Bill 5472 would amend the Michigan Penal Code (MCL 750.411h) to make stalking a misdemeanor punishable by imprisonment for up to one year, a fine of up to $1,000, or both. The court could put a convicted stalker on probation for up to five years. In addition to any other lawful condition of probation, the court could order the defendant to refrain from stalking or having any contact with the victim during the term of probation, and could order the defendant to be evaluated for and to undergo psychiatric, psychological, or social counseling at the defendant's expense. A criminal penalty under the bill could be imposed in addition to any penalty that could be imposed for any other criminal offense arising from the same conduct or for any contempt of court arising from the same conduct.

"Stalking" would be defined as a willful course of conduct involving repeated or continuing harassment that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that caused the victim to experience any of those feelings. "Harassment" would mean repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress, and that actually caused the victim to feel emotional distress. "Emotional distress" would mean significant mental suffering or distress that might require medical treatment or counseling, but would not necessarily require it. "Unconsented contact" would be defined to include behaviors such as following or appearing within the sight of the victim, approaching the victim in a public place or on private property, appearing at the workplace or residence of the victim, contacting the victim by telephone, sending mail or electronic communications to the victim, and placing an object on or delivering an object to property owned, leased, or occupied by the victim.

Senate Bill 719 would amend the penal code (MCL 750.411i) to create the felony of aggravated stalking, which would be punishable by imprisonment for up to five years, a fine of up to $10,000, or both. The court could place a person convicted of aggravated stalking on probation for any number of years, as long as it was at least five years. As with simple stalking, the court could order the offender to refrain from stalking or contacting the victim during the term of probation, and could order the offender to be evaluated for and receive counseling. Also as with simple stalking, penalties imposed for aggravated stalking could be imposed in addition to any penalties that might be available for other criminal offenses or contempt of court arising out of the same conduct.

"Aggravated stalking" would be stalking that involved any of the following circumstances: the actions violated a restraining order or injunction; the actions violated a condition of probation, pretrial release, or release on bond pending appeal; the offender made one or more credible threats against the victim, a member of the victim's family, or someone living in the victim's household; or the offender had previously been convicted of stalking or aggravated stalking.

House Bill 6038 would amend the Code of Criminal Procedure (MCL 764.15b) to authorize the warrantless arrest of someone whom a peace officer had reasonable cause to believe was stalking or violating an injunction against stalking. The bill also contains provisions authorizing the court to order an convicted stalker placed on probation, consistent with House Bill 5472 and Senate Bill 719.

## *FISCAL IMPLICATIONS:*

There is no fiscal information on the substitute bills at present. However, information provided by the Senate Fiscal Agency (SFA) on an earlier version of Senate Bill 719 is applicable. With regard to that bill, the SFA noted that there would be an indeterminate impact on state and local government, presenting additional costs of apprehension, prosecution, and incarceration. (The average annual cost of incarcerating a person in state prison is $25,000.) Costs could be offset by revenues from fines imposed under the legislation. (4-1-92)

## *ARGUMENTS:*

### *For:*

Stalking is a particularly repugnant course of behavior that harasses and intimidates, that mars the lives of victims and their families, and that all too frequently escalates to violence against property, pets, and people. However, the canniness with which stalkers are often able to obey the letter of the law while circumventing its spirit often leaves victims helpless to effectively put an end to the ordeal. The legislation at hand would go far to correct the inadequacies of current law. It criminalizes the uniquely and precisely defined behavior, authorizes warrantless arrests, and explicitly provides for court-ordered counseling and

ong-term probation. In doing so, it puts not only would-be stalkers, but also police, prosecutors, and udges on notice that this is a crime to be taken eriously. The bills should help to deter stalking behavior, to incapacitate stalkers who are not deterred, and to prevent stalkers amenable to counseling from repeating their behavior.

*Against:*
Stalking would be defined in part as something that would make a reasonable person feel threatened or harassed. This could lead to defense counsel obfuscating the issue by attempting to question the reasonableness of the victim, and essentially further victimizing the victim, as can happen in rape trials. As with criminal sexual conduct offenses, the prospect of further harassment in the courtroom could discourage victims from pressing complaints. The offense should be defined with less focus on the victim, and more on the offender. One way of doing so would be to instead define the offense with regard to the intent of the offender, rather than with regard to the effect on the victim.

*Response:*
The jury would be assessing whether the legal construct of a "reasonable person" would feel harassed by the behavior being established in court.

issue, and any line of questioning on the victim's reasonableness would be irrelevant. The prosecutor and judge ought to be able to prevent such a line of questioning from going forward. To incorporate an element of intent as has been proposed would be to require prosecutors to prove that the offender intended to make the victim feel harassed. Prosecutions would be much more difficult, as it would be relatively easy with this sort of offense for a deceptively normal-looking defendant to convince a jury that he or she had no malicious intent, but rather merely wanted to convince the victim of the depth and sincerity of his or her feelings. To incorporate specific intent into the definition of the offense would be to reduce the effectiveness of the legislation.

*Against:*
The legislation would criminalize behavior that could be not only ambiguous, but altogether innocent, such as accidentally appearing within the sight of the victim. It thus becomes important that the offense of stalking be defined with an element of intent, so that constitutional problems may be avoided.

*Response:*
The bills already require that a requisite degree of intent of a sort be shown, as stalking would involve a "willful" course of conduct. This should be adequate to meet constitutional challenges.

*Against:*
Earlier versions of the bills established a rebuttable presumption as to how a reasonable person would feel, given a particular course of conduct. It may be advisable to restore this presumption, as it could aid in prosecutions.

*Response:*
Earlier versions of the legislation incorporated a stronger element of intent in the offense. With that language gone, there is less need for the presumption language.

*Against:*
Stalking would be defined in part as a form of harassment that would cause a reasonable person to suffer emotional distress as defined by the bills. To define emotional distress could be to inappropriately limit the manner in which stalking could be defined, and could lead to further focus on the victim and whether his or her distress was sufficient, rather than on the offender and whether his or her

*Response:*
Without some sort of definition of "emotional distress," the legislation would be unacceptably vague, and there would be little guidance for not only criminal juries, but also civil juries faced with assessing damages under Senate Bill 1095.

## *POSITIONS:*

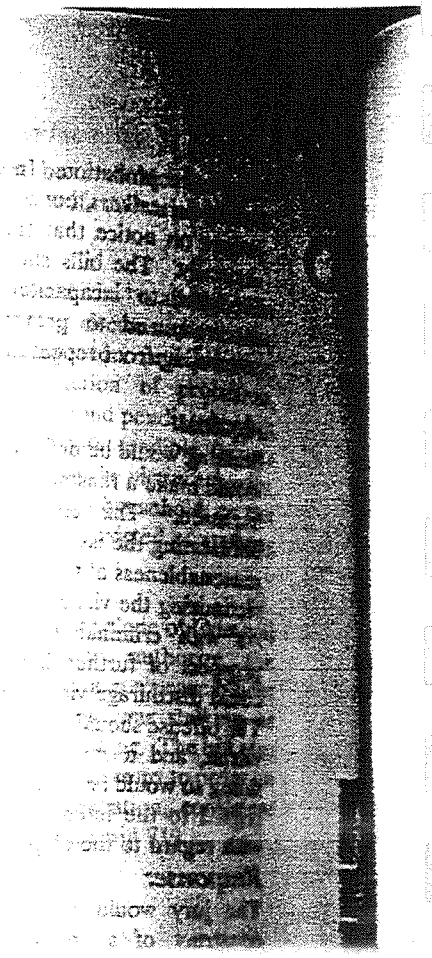
The Prosecuting Attorneys Association of Michigan supports the bills. (9-15-92)

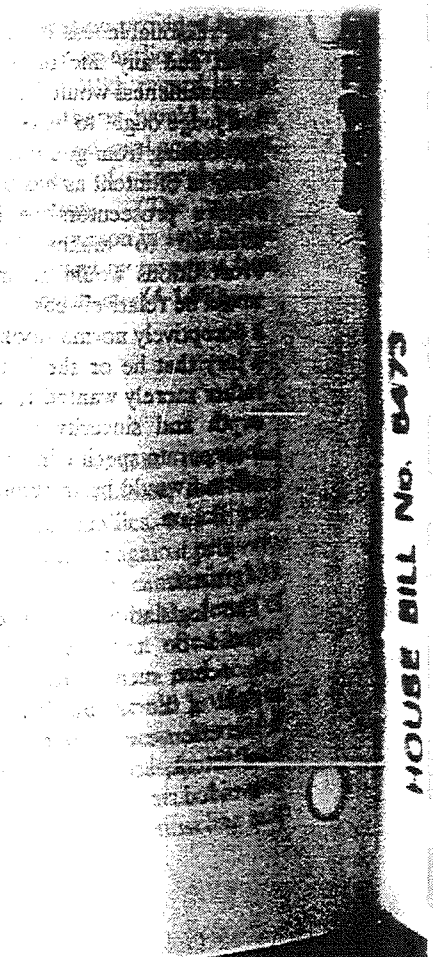
The Domestic Violence Project supports the bills, but would oppose restoration of language that would require intent to be proved. (9-15-92)

The Domestic Violence Prevention and Treatment Board supports the concept of the bills, but does not have a formal position on the substitutes at this time. (9-15-92)

A representative of General Motors testified in support of the bills. (9-15-92)

A representative of the Department of State Police testified in support of the bills. (9-15-92)





SFA BILL ANALYSIS

Senate Fiscal Agency • Lansing, Michigan 48909 • (517) 373-5383



**Senate Bill 719 (Substitute S-2 as reported)**
**Sponsor:** Senator Robert Geake
**Committee:** Judiciary

**Date Completed:** 4-1-92

## RATIONALE

Incidents of stalking behavior are usually reported when celebrities are involved. There are many examples of famous entertainers who are victimized by obsessed fans who follow them, invade their privacy, write to them or call them excessively, or even break into their homes. The stalking of an individual is not an infrequent or unusual activity, however, and occurs in

one study estimates that one in 20 adults will be stalked in his or her lifetime and that up to 200,000 people exhibit traits consistent with those of a stalker. Most often, stalking incidents involve domestic relations matters in which a former spouse, or other family member, or an ex-boyfriend or -girlfriend maliciously follows, harasses, or threatens a victim. The threat of violence, real or perceived, is almost always present in these cases. Indeed, stalking activity often does end in violence: according to the United States Department of Justice, reportedly, one-fifth of all women who are attacked by a family member or boyfriend report that the violence was part of a series of at least three similar acts. Although injunctions and restraining orders are means by which victims can respond to incidents of unwanted attention, often court orders are not effective in deterring stalking activity. California has criminalized stalking and 26 other states apparently are considering such measures. Some people believe that, in order to help protect victims of harassment and deter stalking, Michigan should criminalize such behavior.

## CONTENT

The bill would amend the Michigan Penal Code to create the felonies of first- and **second-degree stalking and the misdemeanors of third- and fourth-degree stalking.** "Stalking" would mean "a willful and malicious course of conduct involving repeated following or harassment of another". A "course of conduct" would be "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose", but would not include constitutionally protected activity. "Harassment" would mean a willful and malicious course of conduct, serving no legitimate purpose, directed toward a specific person, that seriously alarmed or harassed the person, would cause a reasonable person to suffer substantial emotional distress, and actually caused substantial emotional distress to the person.

An individual who engaged in stalking with the intent to terrorize, frighten, intimidate, threaten, harass, or molest the victim would be guilty of fourth-degree stalking. If that activity were in violation of an injunction, preliminary injunction, or restraining order, it would be third-degree stalking. If a person engaged in stalking and the course of conduct included one or more credible threats against the victim, a member of the victim's family, or someone living in the victim's household, with the intent to carry out the threat or to cause the victim to fear the threatened act, the offense would be second-degree stalking. If the stalking involved a credible threat and were in violation of an injunction, preliminary injunction, or restraining order, it would be first-degree stalking. "Credible threat" would mean a threat to kill or inflict serious bodily injury upon another person that was made in any manner or context that caused the person hearing or receiving the

threat reasonably to fear for his or her safety or the safety of another.

First-degree stalking would be punishable by up to five years' imprisonment and/or a maximum fine of $10,000. Second-degree stalking would be punishable by up to three years' imprisonment and/or a maximum fine of $5,000. Third-degree stalking would be punishable by up to two years' imprisonment and/or a maximum fine of $2,500. Fourth-degree stalking would be punishable by up to one year's imprisonment and/or a maximum fine of $1,000. A criminal penalty for stalking could be imposed in addition to any penalty imposed for another criminal offense arising from the same incident or for any civil or criminal contempt arising from the same incident.

Proposed MCL 750.411h

## FISCAL IMPACT

The bill would have an indeterminate impact on State and local government. The new provisions would result in additional costs for the apprehension, prosecution, and incarceration for those individuals who violated these provisions. The actual costs would depend on the number of violators and the length of punishment. It currently costs, on average, approximately $25,000 per year to house a person in State prison.

There also could be some additional revenue generated by the bill as a result of the new fines that it would create.

## ARGUMENTS

### Supporting Argument

A person who continuously annoys another by harassing or following him or her, whether the activity involves an actual threat or is simply intended to frighten or intimidate, should be prosecuted as a criminal. Reportedly, such tactics often are used to terrorize others in domestic disputes, even when there is a court order prohibiting those activities. For victims of domestic violence, the harassment to which they often are subjected after taking steps to protect themselves can be just as abusive as the original assault. By criminalizing stalking, the bill would enable law enforcement officials to respond more effectively to complaints of harassment and intimidation and to offer better protection to victims of domestic violence. In addition, by defining stalking with reference to a willful and malicious course of conduct, the bill would ensure that an isolated incident of unwanted attention or words of anger spoken in the heat of a moment did not constitute the proposed crime of stalking.

Legislative Analyst: P. Affholter
Fiscal Analyst: M. Hansen

A9192\S719A

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.

# SENATE BILL No. 719

February 13, 1992, Introduced by Senators GEAKE, DINGELL, MC MANUS, WELBORN, EMMONS, CISKY, POLLACK, CONROY, BOUCHARD, HONIGMAN and DI NELLO and referred to the Committee on Judiciary.

A bill to amend Act No. 328 of the Public Acts of 1931, itled as amended
e Michigan penal code,"
amended, being sections 750.1 to 750.568 of the Michigan piled Laws, by adding section 411h.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Act No. 328 of the Public Acts of 1931, as nded, being sections 750.1 to 750.568 of the Michigan Compiled s, is amended by adding section 411h to read as follows:

SEC. 411H. (1) A PERSON WHO WILLFULLY, MALICIOUSLY, AND EATEDLY FOLLOWS OR HARASSES ANOTHER PERSON AND WHO MAKES A DIBLE THREAT AGAINST THAT PERSON OR AGAINST A MEMBER OF THAT SON'S FAMILY, OR AGAINST ANOTHER PERSON LIVING IN THAT SON'S HOUSEHOLD, IS GUILTY OF THE CRIME OF STALKING IN THE

TVD

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SECOND DEGREE, A FELONY, PUNISHABLE BY IMPRISONMENT FOR NOT MORE THAN 2 YEARS, OR A FINE OF NOT MORE THAN $5,000.00, OR BOTH.

(2) A PERSON WHO VIOLATES SUBSECTION (1) WHEN THERE IS A TEMPORARY RESTRAINING ORDER OR AN INJUNCTION IN EFFECT PROHIBITING THE BEHAVIOR DESCRIBED IN SUBSECTION (1) AGAINST THE SAME PERSON, IS GUILTY OF THE CRIME OF STALKING IN THE FIRST DEGREE, A FELONY, PUNISHABLE BY IMPRISONMENT FOR NOT MORE THAN 4 YEARS OR BY A FINE OF NOT MORE THAN $10,000.00, OR BOTH.

(3) AS USED IN THIS SECTION:

(A) "COURSE OF CONDUCT" MEANS A PATTERN OF CONDUCT COMPOSED OF A SERIES OF ACTS OVER A PERIOD OF TIME, HOWEVER SHORT, EVI-

[illegible] CONSTITUTIONALLY PROTECTED

ACTIVITY IS NOT INCLUDED WITHIN THE MEANING OF COURSE OF CONDUCT.

(B) "CREDIBLE THREAT" MEANS A THREAT TO KILL OR CAUSE SERIOUS BODILY INJURY TO ANOTHER PERSON, THAT IS MADE WITH THE INTENT AND THE APPARENT ABILITY TO CARRY OUT THE THREAT, AND THAT CAUSES THE PERSON HEARING OR RECEIVING THE THREAT TO REASONABLY FEAR FOR HIS OR HER SAFETY OR THE SAFETY OF ANOTHER PERSON.

(C) "HARASSES" MEANS A WILLFUL AND MALICIOUS COURSE OF CONDUCT DIRECTED AT A SPECIFIC PERSON THAT SERIOUSLY ALARMS, ANNOYS, OR HARASSES THE PERSON, THAT SERVES NO LEGITIMATE PURPOSE, THAT WOULD CAUSE A REASONABLE PERSON TO SUFFER SUBSTANTIAL EMOTIONAL DISTRESS, AND THAT CAUSES SUBSTANTIAL EMOTIONAL DISTRESS TO THE PERSON.

(4) THIS SECTION DOES NOT PROHIBIT AN INDIVIDUAL FROM BEING CHARGED WITH, CONVICTED OF, OR PUNISHED FOR CRIMINAL CONTEMPT THAT IS COMMITTED BY THE PERSON WHILE VIOLATING THIS SECTION.

B

*1996 Mich. App. LEXIS 693, **

ANN LEIGHTON, Plaintiff-Appellee, v GAIL A. ZEIGLER, Defendant-Appellant.

No. 187747

COURT OF APPEALS OF MICHIGAN

1996 Mich. App. LEXIS 693

November 22, 1996, Decided

**NOTICE:** **[*1]** IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

**PRIOR HISTORY:** LC No. 94-001151-CZ.

**DISPOSITION:** Affirmed.

**JUDGES:** Before: Saad, P.J., and Griffin and M. H. Cherry, * JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

**OPINION:**

MEMORANDUM.

Following a bench trial, the trial court found that defendant had stalked plaintiff as defined in MCL 750.411h; MSA 28.653(8), and awarded plaintiff $ 2,212.72 in costs and damages pursuant to the civil stalking statute, MCL **600.2954**; MSA 27A.2954. Defendant appeals from the judgment as of right. We affirm.

Defendant first contends that the trial court erred in finding that defendant stalked plaintiff. We disagree. The evidence demonstrated that defendant purposefully harassed plaintiff, including repeated and purposeful contacts with plaintiff long after defendant was made aware that she no longer wished to have contact with him, causing plaintiff to feel frightened and intimidated. MCL 750.411h(1); MSA 28.643(8)(1). Testimonial and circumstantial evidence presented **[*2]** at trial also indicated that defendant was responsible for placing dead animals on and near plaintiff's car and throwing raw chicken parts on the balcony of plaintiff's apartment. The trial court's finding that defendant engaged in stalking was not clearly erroneous.

Defendant next contends that the trial court incorrectly assessed plaintiff's damages, in that it required plaintiff's damages to have been foreseeable by defendant. We disagree. We note that the trial court specifically found that plaintiff's damages were incurred "as a result of defendant's conduct," as required by the civil stalking statute. MCL **600.2954**(1); MSA 27A.2954(1). Defendant also argues that the trial court erred when it awarded damages to plaintiff for her expenses; defendant maintains that plaintiff did not prove her expenses

with reasonable certainty. We disagree. We note that plaintiff testified regarding the general nature of her expenses and attested to the accuracy of a summarized list of her expenses. We also note that the trial court received this list as a non-evidentiary reference of plaintiff's testimony. Reviewing these items together, the trial court's findings regarding **[*3]** the amount of plaintiff's expenses were not clearly erroneous.

Finally, defendant contends that the trial court erred when it awarded plaintiff exemplary damages. We disagree. Defendant admits that he placed a pair of women's panties with plaintiff's name written on them over a sign at plaintiff's place of employment. We agree with the trial court that this demonstrated a wilful and reckless disregard of plaintiff's rights. Given plaintiff's resulting feelings of humiliation, outrage, and indignity, exemplary damages were wholly appropriate. *Veselenak v Smith*, 414 Mich. 567, 574-575; 327 N.W.2d 261 (1982); see also *Janda v Detroit*, 175 Mich. App. 120, 127-128; 437 N.W.2d 326 (1989). Furthermore, defendant's contention that an award of exemplary damages somehow allows plaintiff to recover twice for her injuries is simply wrong. Plaintiff recovered for her out-of-pocket expenses and for her emotional damages only once each.

Affirmed.

/s/ Henry William Saad

/s/ Richard Allen Griffin

/s/ Michael H. Cherry

*1997 Mich. App. LEXIS 2134, **

SANDRA PEPPERMAN and JOHN PEPPERMAN, Plaintiffs-Appellants, v GENERAL MOTORS CORP., Defendant-Appellee.

No. 197097

COURT OF APPEALS OF MICHIGAN

1997 Mich. App. LEXIS 2134

November 4, 1997, Decided

**NOTICE: [*1]** IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

**PRIOR HISTORY:** Oakland Circuit Court. LC No. 95-505857-NO.

**DISPOSITION:** Affirmed.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Plaintiffs, an employee and her husband, appealed an order of the Oakland Circuit Court (Michigan), which granted summary disposition to defendant employer in plaintiffs' action based on negligent supervision, hostile work environment sexual harassment, and loss of consortium, alleging that the employer failed to stop a co-worker's sexual harassment. On appeal she relied on the Michigan Civil Rights Act, Mich. Comp. Laws § 37.2101 et seq.

**OVERVIEW:** The employee had a consensual sexual relationship with a co-worker, which she ended when she decided to marry. The co-worker then allegedly began sexually harassing her both in the workplace and at home. The employer issued the co-worker a warning when the employee complained, and the harassment in the workplace ceased, but it continued at home. The employee obtained a stalking injunction and filed the instant action. The trial court granted summary judgment to the employer, finding that most of the co-worker's conduct occurred off the employer's premises and that the employer took appropriate action to prevent misconduct on its premises by warning him to desist or be subject to disciplinary action including discharge. The court affirmed because the employee failed to offer evidence to create an issue of fact under the Michigan Civil Rights Act, Mich. Comp. Laws § 37.2101 et seq., as to whether the harassment created a hostile work environment. The employee failed to establish a sufficient nexus between the employer and the harassment to render the employer liable and failed to prove that the employer did not take prompt, remedial action to dispel the alleged harassment.

**OUTCOME:** The court affirmed the trial court's grant of summary judgment to the employer.

**CORE TERMS:** harassment, hostile work environment, co-worker, sexual harassment, stalking, injunction, prompt, misconduct, workplace, remedial action, et seq, offensive, unwelcome, sexual, respondeat superior, sexual conduct, intimidating, non-moving, terminate, interfere, negligent supervision, confronted, hostile, Michigan Civil Rights Act,

documentary evidence, reasonable person, sufficient nexus, facts sufficient, plain meaning, subjected

**LexisNexis (TM) HEADNOTES - Core Concepts - ◆ Hide Concepts**

Civil Procedure > Summary Judgment > Supporting Papers & Affidavits
Civil Procedure > Summary Judgment > Burdens of Production & Proof
Civil Procedure > Summary Judgment > Summary Judgment Standard

HN1 A motion under Mich. Ct. R. 2.116(C)(10) will be granted where there is no factual support for a claim; the moving party will then be entitled to judgment as a matter of law. In deciding a motion under Rule 2.116(C)(10), the court must consider the available pleadings, affidavits, depositions, admissions and other documentary evidence in favor of the non-moving party. Mich. Ct. R. 2.116(G)(5). The court is not permitted to assess credibility or to determine factual issues. The party seeking summary disposition must identify the issues for which it claims there is no genuine factual dispute. The non-moving party must then respond with affidavits or other evidentiary materials that establish the existence of a factual issue for trial. The non-moving party may not simply rely on allegations or denials in the pleadings. Summary disposition is proper if the opposing party cannot present documentary evidence to establish that a material factual dispute exists. More Like This Headnote

Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment

HN2 The Michigan Civil Rights Act, Mich. Comp. Laws § 37.2101 et seq., recognizes a cause of action in sexual harassment where the conduct in question impermissibly interferes with one's ability to work. The statute provides, in part, that discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or

purpose or effect of substantially interfering with an individual's employment, or creating an intimidating, hostile, or offensive employment environment. Mich. Comp. Laws § 37.2103. More Like This Headnote

Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment

HN3 In order to establish a prima facie case of hostile work environment sexual harassment, a plaintiff must prove the following elements: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of sex; (3) the employee was subjected to unwelcome sexual conduct or communication; (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. Mich. Comp. Laws §§ 37.2103(h), 37.2202(1)(a). More Like This Headnote

Evidence > Procedural Considerations > Inferences & Presumptions
Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment

HN4 The Michigan Supreme Court has concluded that the plain meaning of the Michigan Civil Rights Act, Mich. Comp. Laws § 37.2101 et seq., mandates an objective reasonableness standard, and courts must examine the totality of the circumstances surrounding alleged harassment to assess whether a reasonable person would perceive the conduct at issue as creating an "offensive," "hostile," or "intimidating" environment. More Like This Headnote

Labor & Employment Law > Discrimination > Sexual Harassment > Prevention & Correction
Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment

HN5 An employer may avoid liability based on sexual harassment at work, if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment. Prompt, remedial action by the employer will defeat liability if a co-worker or a supervisor is accused of harassment. Thus, a plaintiff must allege facts sufficient for a reasonable trier of facts to conclude that the defendant was, in fact, aware of the misconduct, or involved in creating or condoning the harassment, to such an extent that plaintiff was injured as a result of the defendant's actions or omissions. More Like This Headnote

**JUDGES:** Before: Saad, P.J., and O'Connell and M. J. Matuzak *, JJ.

* Circuit judge, sitting on the Court of Appeals by assignment.

**OPINION:**

PER CURIAM.

Plaintiffs appeal as of right from the order of the circuit court granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant. We affirm.

Plaintiff Sandra Pepperman (hereinafter plaintiff) was employed by defendant and worked at defendant's Lake Orion Plant. During the time that she worked at the plant, plaintiff had a consensual, sexual relationship with another employee. Plaintiff ended this relationship in 1991 when she decided to marry John Pepperman, her present husband. According to plaintiff, her ex-boyfriend then began sexually harassing her both in the workplace and at her home. Plaintiff reported the alleged harassment to the Labor Relations Department on various occasions. The Supervisor of Labor Relations confronted the harasser and cautioned him to leave plaintiff alone. The supervisor [*2] also told the man that any additional contact he had with plaintiff would result in formal discipline, including discharge. The alleged harassment at the workplace ceased after the warning; however, the harassment continued at plaintiff's home and on other occasions when plaintiff was away from the workplace. Plaintiff testified that she received, in the mail, notes, cards, and nude pictures of herself that were taken by the co-worker during their relationship. Her mother-in-law received a videotape suggesting that plaintiff was having an affair with a co-worker. Plaintiff subsequently obtained a permanent restraining order against the co-worker in the Wayne County Circuit Court.

Plaintiff, joined by her husband, filed this lawsuit against defendant based on negligent supervision, hostile work environment sexual harassment, and loss of consortium. n1 Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted defendant's motion, finding that the majority of the co-worker's conduct occurred off defendant's premises and during non-business hours. The court also concluded that defendant took appropriate action to prevent the misconduct of its **[*3]** employee on the premises by "warning him to desist or he would be subject to disciplinary action including discharge."

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 The trial court dismissed the negligent supervision claim based on the exclusive remedy provision in the Worker's Compensation Act. The negligent supervision and loss of consortium claims are not raised on appeal.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

On appeal, plaintiff argues that that the trial court erred in dismissing her sexual harassment claim and that her claim is supported by the Michigan Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* Plaintiff specifically argues that there was a sufficient nexus between defendant and the harassment and that defendant failed to take prompt, remedial action to terminate the harassment. Plaintiff also asserts that the trial court failed to give any attention to the fact that a stalking injunction had been issued against the harasser. We disagree.

HN1 A motion under MCR 2.116(C)(10) will be granted where there is no factual support for a claim; **[*4]** the moving party will then be entitled to judgment as a matter of law. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). In deciding a motion under MCR 2.116 (C)(10), this Court must consider the available pleadings, affidavits, depositions, admissions and other documentary evidence in favor of the non-moving party. *Id.*; MCR 2.116(G)(5). The Court is not permitted to assess credibility or to determine factual issues. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The party seeking summary disposition must identify the issues for which it claims there is no genuine factual dispute. *Id.* at 160. The non-moving party must then respond with affidavits or other evidentiary materials that establish the existence of a factual issue for trial. *Id.* The non-moving party may not simply rely on allegations or denials in the pleadings. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is proper if the opposing party cannot present documentary evidence to establish that a material factual dispute exists. *Id.* at 362-363. **[*5]**

HN2 The Michigan Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, recognizes a cause of action in sexual harassment where the conduct in question impermissibly interferes with one's ability to work. The statute provides, in pertinent part:

> (h) Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:
>
> * * *
>
> (iii) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment, . . . or creating an intimidating, hostile, or offensive employment . . . environment. [ MCL 37.2103(h)(iii); MSA 3.548(103)(h).]

HN3 In order to establish a *prima facie* case of hostile work environment sexual harassment, plaintiff must prove the following elements:

> (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of sex; (3) the employee was subjected to unwelcome sexual conduct or communication; (4) the unwelcome sexual conduct or communication was intended **[*6]** to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. [ *Radtke, supra* at 382-383 (citing MCL 37.2103[h], 37.2202[1][a]; MSA 3.548[103][h], 3.548[202][1][a]).]

Elements four and five are the primary issues in dispute in this matter.

In *Radtke, supra,* the Supreme Court examined the Civil Rights Act to determine the standard by which courts should evaluate a hostile work environment claim. The Court noted that the purpose of the act "is to combat serious demeaning and degrading conduct based on sex in the workplace, and to allow women the opportunity to fairly compete in the marketplace." *Id.* at 387. However, the Court also noted that to simply adopt all of the plaintiff's subjective findings of harassment, and blindly impose liability on employers, without inquiry as to whether such conduct was merely offensive to this employee or whether the conduct warrants liability, would be contrary to the plain meaning and purpose of the statute. *Id.* HN4 The Court concluded that **[*7]** the plain meaning of the statute mandates an objective reasonableness standard, and therefore that courts must examine the totality of the circumstances surrounding the alleged harassment to assess whether a reasonable person would perceive the conduct at issue as creating an "offensive," "hostile," or "intimidating" environment. *Id.* at 386-387, 394.

Initially, we find that summary disposition was proper because plaintiff failed to offer enough evidence to create a genuine issue of material fact as to whether the harassment created a hostile work environment. Not only did plaintiff fail to establish a sufficient nexus between defendant and the harassment to render defendant liable, but plaintiff failed to prove that defendant did not take prompt, remedial action to dispel the alleged harassment. Generally, hostile work environment sexual harassment is "unwelcome sexual conduct *in the workplace* that *unreasonably interferes with an employee's work performance.*" *McCallum v Corrections Dep't,* 197 Mich App 589, 596; 496 NW2d 361 (1992) (emphasis added). In this case, plaintiff alleged that her co-worker approached her several times at **[*8]** work in an effort to rekindle an old romance. However, most of the alleged misconduct did not occur at work and was limited to a hostile work environment. Moreover, even if the harassment was disruptive to plaintiff's concentration at times, we do not find that it created a situation where plaintiff was unable to complete her job responsibilities or that she could not come to work in fear of confronting her co-worker. In addition, plaintiff does not allege, nor is there evidence suggesting, that plaintiff was required to submit to her co-worker's advances or tolerate the alleged harassment to maintain her position. In fact, defendant opposed the behavior and immediately expressed its intolerance for the misconduct. Therefore, we hold that plaintiff's allegations, taken as true, were not so pervasive as to alter the conditions of plaintiff's employment. Hence, they did not rise to the level of severity necessary to sustain an actionable claim against defendant for hostile work environment sexual harassment.

We also find that plaintiff failed to establish the element of respondeat superior. HN5 An employer may avoid liability based on sexual harassment at work, "if it adequately **[*9]** investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Radtke, supra* at 396 (quoting *Downer v Detroit Receiving Hosp,* 191 Mich App 232, 234; 477 NW2d 146 (1991)). Prompt, remedial action by the employer will defeat liability if a co-worker or a supervisor is accused of harassment. *Radtke, supra; McCalla v Ellis,* 180 Mich App 372, 380; 446 NW2d 904 (1989); *McCarthy v State Farm Ins Co,* 170 Mich App 451, 457; 428 NW2d 692 (1988). Thus, plaintiff must allege facts sufficient for a reasonable trier of facts to conclude that defendant was, in fact, aware of the misconduct, or involved in creating or condoning the harassment, to such an extent that plaintiff was injured as a result of defendant's actions or omissions. *Radtke, supra* at 397; *McCarthy, supra.*

In the instant case, plaintiff admittedly reported the instances of alleged harassment while at work to defendant's Labor Relations Department. Thus, there is no question that defendant was aware that a problem existed. However, **[*10]** defendant can only be held responsible for eliminating problems that occurred at the workplace -- not those that plaintiff encountered elsewhere. Thus, we conclude that when defendant's agents initially confronted

the employee regarding the alleged incidents of harassment in an effort to end the problem, it took appropriate measures to terminate the misconduct. In addition, we believe that when defendant's agents confronted the employee a second time and warned him that his behavior was intolerable and he would be disciplined and possibly discharged if it continued, this was a prompt and appropriate response to plaintiff's allegations. Furthermore, we note that plaintiff did not report any additional instances of harassment at work after defendant's admonition. Therefore, because plaintiff has not alleged facts sufficient to prove that defendant was directly responsible for the alleged sexual harassment, or that it failed to take prompt, remedial action to terminate the misconduct, the respondeat superior element has not been satisfied. Hence, plaintiff has failed to establish a claim of hostile work environment.

Finally, plaintiff argues that the trial court erred by failing to consider **[*11]** the stalking injunction issued against the co-worker in granting defendant's motion for summary disposition. We disagree. Initially, we note that the present action names General Motors Corporation as defendant rather than the employee that plaintiff alleged was harassing her. The stalking injunction was issued in response to a claim filed by plaintiff against her co-worker and does not refer to, nor include, defendant as a party or contributor to the culpable conduct. Moreover, the findings of fact made by the circuit court regarding the injunction made absolutely no mention of defendant, nor do they reference any alleged harassment while plaintiff was at work. To the contrary, the order was granted based on explicit findings of "stalking" at plaintiff's home. In this respect, we note that "stalking," by definition, need not have any sexual connotations attached to it to be actionable. n2 In any event, even if the court did consider the stalking injunction in deciding the motion for summary disposition, the basis of the injunction provides no support for plaintiff's theory that defendant should be held liable for hostile work environment sexual harassment. Defendant was not a party **[*12]** to the injunction, nor was it even mentioned in the court's order.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 A civil action for stalking requires the plaintiff to prove that the defendant engaged in a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, intimidated, threatened, or molested and that actually causes those feelings. MCL 750.411h; MSA 28.643(8); MCL 600.2954; MSA 27A.2954.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[ILLEGIBLE TEXT]

Therefore, we hold that the trial court did not err by not considering the stalking injunction in evaluating defendant's motion for summary disposition.

Affirmed.

/s/ Henry William Saad

/s/ Peter D. O'Connell

/s/ Michael J. Matuzak

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*82 Wn. App. 298, *; 917 P.2d 159, **;*
*1996 Wash. App. LEXIS 213, ****

STATE OF WASHINGTON, Respondent, v. ORSON H. LEE, B.D. 1-20-76, Appellant. STATE OF WASHINGTON, Respondent, v. BRIAN YATES, Petitioner.

NO. 35012-9-I (Consolidated 1), NO. 36767-6-I (Consolidated 2)

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

82 Wn. App. 298; 917 P.2d 159; 1996 Wash. App. LEXIS 213

June 3, 1996, FILED

**SUBSEQUENT HISTORY: [***1]**

Petition for Review Granted December 4, 1996, Reported at: 1996 Wash. LEXIS 774.

**PRIOR HISTORY:** Superior Court County: King. Superior Court Cause No: 94-8-00062-6.SEA & 94-1-01016-2.SEA. Date filed in Superior Court: July 20, 1994 & May 9, 1995. Superior Court Judge Signing: Judge Mary Brucker & Judge Patricia Aitken

**DISPOSITION:** Both convictions are affirmed.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** In consolidated cases, defendants appealed judgments from Superior Court, King County (Washington), which convicted defendants of stalking in violation of Wash. Rev. Code § 9A.46.110.

**OVERVIEW:** Defendants were charged with stalking after they repeatedly followed women for whom they had romantic feelings. They contended that the stalking statute was overbroad and vague. The court affirmed the convictions, holding that although the word "follow" was not defined, its plain and ordinary meaning meant to deliberately and repeatedly correlate one's movements or appearances with another person's in order to have contact with the person. The court also determined that the statute was not vague because a reasonable person could look to identifiable sources of law defining when "lawful authority" existed to follow others. The court found no substantial impact on protected First Amendment, U.S. Const. amend. I, activities because the **stalking** statute only applied to acts causing fear in the victim; hence, the statute was not overbroad. Although the statute contained an exception for licensed **private detectives,** the court found no equal protection violation because that distinction was not irrational.

**OUTCOME:** The court affirmed defendants' convictions for **stalking.**

**CORE TERMS:** stalking, First Amendment, lawful authority, unconstitutionally vague, harassed, overbreadth, stalker, intimidated, vagueness, Criminal Law, unconstitutionally overbroad, harass, intend, insufficient evidence, harassment, feeling, commit, right to travel, criminal statute, common law, intelligence, intimidate, freely, intimidation, detective, lawful,

deliberately, licensed, Constitutional Law, state action

**LexisNexis (TM) HEADNOTES - Core Concepts - ♦ Hide Concepts**

Criminal Law & Procedure > Criminal Offenses > Crimes Against the Person > Stalking & Intimidation

*HN1* Wash. Rev. Code § 9A.46.110 provides: (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime: (a) He or she intentionally and repeatedly follows another person to that person's home, school, place of employment, business, or any other location, or follows the person while the person is in transit between locations; and (b) The person being followed is intimidated, harassed, or placed in fear that the stalker intends to injure the person or property of the person being followed or of another person. The feeling of fear, intimidation, or harassment must be one that a reasonable person in the same situation would experience under all the circumstances; and (c) The stalker either: (i) Intends to frighten, intimidate, or harass the person being followed; or (ii) Knows or reasonably should know that the person being followed is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person. (4) Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person. More Like This Headnote

Governments > Legislation > Interpretation

*HN2* Where a term is not defined in a statute, a court looks to the plain, ordinary meaning of the word. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against the Person > Stalking & Intimidation

meaning of the word includes movement correlated with the movement of the followee. A person "follows" another within the meaning of Wash. Rev. Code § 9A.46.110 if he deliberately and repeatedly correlates his movements or appearances with another person's in order to have contact with the person. More Like This Headnote

Constitutional Law > Fundamental Freedoms > Overbreadth & Vagueness

Governments > Legislation > Overbreadth & Vagueness

*HN4* Overbreadth doctrine creates a limited exception to the usual rule that a party will not be heard to challenge a statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court. Because striking down a statute based on facial overbreadth is exceptionally strong medicine, the doctrine applies only in the uniquely important realm of First Amendment rights, U.S. Const. amend. I. Because of the important rights protected by the First Amendment, the overbreadth doctrine allows a litigant to challenge a statute on its face, rather than as applied to his own facts, and have a statute invalidated for overbreadth where it would be unconstitutional as applied to others even if not as applied to him. The doctrine is designed to short circuit the process by which a statute's constitutionality is addressed only on a case-by-case basis, thereby eliminating the chilling effect on legitimate First Amendment activity that would be created by leaving an unconstitutional statute on the books. A statute that regulates conduct, as opposed to speech, will not be considered unconstitutionally overbroad unless its impact on First Amendment activities is both real and substantial in relation to the statute's plainly legitimate sweep. More Like This Headnote

Constitutional Law > Fundamental Freedoms > Overbreadth & Vagueness

Criminal Law & Procedure > Criminal Offenses > Crimes Against the Person > Stalking & Intimidation

HN5 Wash. Rev. Code § 9A.46.020 provides that a person is guilty of "harassment" if the person threatens another and causes reasonable fear that the threat will be carried out. Thus, a person is only "harassed" within the meaning of § 9A.46.020 if the person experiences a feeling of fear. Similarly, one must feel fear in order to be "intimidated" as the term is commonly understood. Thus read, the statute's impact on First Amendment, U.S. Const. amend. I, activities is not substantial. Any overbreadth in this regard may be addressed adequately on a case-by-case basis; it does not justify a prospective invalidation of the statute. The stalking statute is not unconstitutionally overbroad. More Like This Headnote

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Governments > Legislation > Overbreadth & Vagueness

HN6 A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice of what conduct the statute prohibits, or is so indefinite that it encourages arbitrary arrests and convictions. A court approaches a vagueness challenge with a strong presumption in favor of the statute's validity. The party challenging the constitutionality of a legislative enactment has the burden of proving it is unconstitutionally vague beyond a reasonable doubt. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against the Person > Stalking & Intimidation

Governments > Legislation > Overbreadth & Vagueness

HN7 There are many identifiable sources of law which could give individuals "lawful authority" to follow others. Persons of common intelligence may look to these sources to determine whether their behavior violates the stalking statute, Wash. Rev. Code § 9A.46.110. In some situations, there may be room for debate as to whether certain behavior is "lawful" under statutory or common law authority. This possibility does not render the statute unconstitutionally vague. More Like This Headnote

Constitutional Law > Procedural Due Process > Scope of Protection

HN8 Generally, in looking at the degree of process that will be afforded in a particular case, the court balances the following interests; (1) the private interest to be protected; (2) the risk of erroneous deprivation of the interest by the government's procedures; and (3) the government's interest in maintaining the procedures. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against the Person > Stalking & Intimidation

Constitutional Law > Procedural Due Process > Scope of Protection

HN9 Prohibition of "stalking" does not intrude on any substantial private interest. The risk of erroneous deprivation of liberty is minimal, as Wash. Rev. Code § 9A.46.110 can only be enforced upon a showing that the defendant's following behavior was intentional, and that it provoked a reasonable sense of fear. The state has a strong interest in curtailing **stalking** behavior. The statute does not violate procedural due process. More Like This Headnote

Constitutional Law > Equal Protection > Level of Review

Criminal Law & Procedure > Criminal Offenses > Crimes Against the Person > Stalking & Intimidation

HN10 Wash. Rev. Code § 9A.46.110(3) provides that it shall be a defense to the crime of **stalking** that the defendant is a licensed **private detective** acting within the capacity of his or her license as provided by Wash. Rev. Code ch. 18.165. Because the exclusion for licensed **private detectives** does not implicate a fundamental right or a suspect class, equal protection requires only that the distinction have a rational basis. The statutory exemption for licensed private detectives is

presumably based on the legislature's conclusion that these individuals pose relatively little threat of harm to the people they follow. In view of the fact that private investigators are subject to other state regulations, the statutory distinction is not irrational. More Like This Headnote

◆ Show Headnotes / Syllabus

**COUNSEL:** For Appellant Orson H. Lee: Eric Broman.

For Brian Yates: Neil Martin Fox.

For Respondent: Peter Erik Meyers.

**JUDGES:** Written by: Judge Becker. Concurred by: Judge Coleman and Judge Grosse

**OPINIONBY:** BECKER

**OPINION: [*301] [**162]** BECKER, J. -- Orson Lee and Brian Yates appeal convictions under the stalking statute, RCW 9A.46.110. Appellants contend the statute is unconstitutionally overbroad and vague, and that it violates equal protection and due process. Each appellant also argues there was insufficient evidence to convict. We affirm both convictions.

**I.**

On October 29, 1993, Brian Yates was convicted of stalking in violation of the former HN1

(1) A person commits the crime of stalking if, without lawful **[*302]** authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly follows another person to that person's home, school, place of employment, **[***2]** business, or any other location, or follows the person while the person is in transit between locations; and

(b) The person being followed is intimidated, harassed, or placed in fear that the stalker intends to injure the person or property of the person being followed or of another person. The feeling of fear, intimidation, or harassment must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person being followed; or

(ii) Knows or reasonably should know that the person being followed is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

. . .

(4) Attempts to contact or follow the person after being given actual notice that

the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person.

On July 11, 1994, a juvenile division of King County Superior Court found Orson Lee guilty of stalking under the same statute. This court consolidated Lee's and Yates' appeals.

**II.**

We first **[***3]** consider Brian Yates' challenge to the sufficiency of the evidence against him. Yates stipulated to a trial based on police reports detailing complaints by his former girlfriend, B. Egan. Yates and Egan separated in September 1992. Egan said she left Yates after he became physically abusive.

**[*303]** On January 5, 1993, Yates went to Egan's apartment to take back a VCR he had given her for Christmas. When Egan asked Yates to leave, he pushed her to the floor and **[**163]** took the VCR. This incident led to the filing of burglary and assault charges against Yates.

On January 6, Egan saw Yates near her apartment and again near her son's daycare. When Yates called her that afternoon, Egan asked him not to contact her. In a series of reports to police over the next several months, Egan complained that Yates was following her. On January 13, Egan reported that Yates followed her in his car as she traveled to various locations. On January 16, she reported Yates had followed her home from work. A report dated March 17 states that he followed her to the store and back to her apartment, and then to her lawyer's office. On March 23, Egan drove onto the freeway in an attempt to evade Egan from her home to her son's daycare. Yates did not stop following Egan until she pulled into the parking lot of a police station. On April 11, police found Yates wandering near Egan's apartment. While staying with a friend on April 19, Egan saw Yates driving back and forth in front of the house.

Yates contends there was insufficient evidence to show he followed Egan "without lawful authority". In State v. Smith, n1 the Washington Supreme Court interpreted this phrase to mean authority found in "readily ascertainable sources" of statutory or common law.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 State v. Smith, 111 Wash. 2d 1, 11, 759 P.2d 372 (1988).

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In support of his contention that he had lawful authority to follow Egan, Yates mainly relies on cases concerning tort actions for invasion of privacy. n2 In Mark v. Seattle Times, the plaintiff alleged that news reporters tortiously intruded into his private affairs when they filmed him through the window at his place of business. **[***5]**

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 See Mark v. Seattle Times, 96 Wash. 2d 473, 635 P.2d 1081 (1981), cert. denied, 457 U.S. 1124, 73 L. Ed. 2d 1339, 102 S. Ct. 2942 (1982); Jeffers v. Seattle, 23 Wash. App. 301, 597 P.2d 899 (1979).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

**[*304]** The Court recognized that the tort of "intrusion" generally does not lie against one who simply follows or views another in a public place;

> On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. n3

The Court affirmed an order of summary judgment in favor of the television station on the grounds that "the place from which the film was shot was open to the public and thus any passerby could have viewed the scene recorded by the camera." n4

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 Mark, 96 Wash. 2d at 497 (quoting W. Prosser, Torts, 808 (4th ed. 1971)).
n4 Mark, 96 Wash. 2d at 499.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***6]**

Mark and similar cases suggest, at most, that Yates did not commit the specific tort of

broader proposition that Yates had "lawful authority" to act as he did. The trial court correctly concluded that Yates did not have "lawful authority" to follow Egan.

Yates also contends there was insufficient evidence to show that Egan was "intimidated, harassed, or placed in fear" by his conduct. The evidence showed that Yates persistently followed Egan over a three month period, despite her repeated requests to be left alone. Egan said Yates had abused her in the past, and that she was terrified by his ongoing conduct. This was sufficient to show that that Egan teared Yates, and that her apprehension of fear was reasonable. We conclude the evidence was sufficient to support Yates'conviction.

**III.**

We next consider Lee's contention that there was insufficient evidence to convict him of stalking. Lee's disposition **[*305]** was based on testimony concerning series of contacts between Lee and B. Gross. In October 1993, Lee began to appear at Gross' workplace, a restaurant in a large shopping mall. During **[***7]** the last two weeks of the month, Lee **[**164]** was there at least every other day. Typically, Lee would approach and attempt to talk to Gross. When Gross refused to talk to him, Lee would buy a soda, sit down in the adjacent food court, and stare at Gross. Lee would maintain this behavior for as long as ten hours at a time. Lee also left a series of notes for Gross, saying that he wanted to talk to her, that he had "feelings" for her, and that he would keep her constantly in sight to make sure she did not get hurt. He wrote, "You know that I will not let anyone hurt you if I'm still your friend." At least once, Gross saw Lee on the bus as she traveled home in the evening.

Lee contends there was insufficient evidence to show he "followed" Gross within the meaning of the stalking statute. Lee asserts, relying on one dictionary definition, n5 that the word "follows" refers only to situations where the follower moves along behind someone. Lee did

not walk behind Gross as she went in or out of the mall; he simply appeared there during her working hours.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n5 "follow": "to go, proceed, or come after: move behind over the same path or course . . ." Webster's Third New International Dictionary 883 (1966).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***8]**

At the time of Lee's conviction, the statute did not define the term "follows". n6 HN2 Where a term is not defined in a statute, this court looks to the plain, ordinary meaning **[*306]** of the word. n7 HN3 The meaning of "follow" is not limited to "trail" or "tail". The plain and ordinary meaning of the word includes movement correlated with the movement of the followee. n8

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n6 The Legislature amended the statute in 1994, adding, among other things, this definition:

> "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and
>
> business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another.

RCW 9A.46.110(6)(a).
n7 Amercian Legion Post 32 v. Walla Walla, 116 Wash. 2d 1, 802 P.2d 784 (1991);
n8 See Webster's Third New International Dictionary 883 (1966) ("to move or change in constant relation to: correlate with").

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***9]**

This court will not adopt "a forced, narrow, or overstrict construction which defeats the intent of the legislature." n9 The statute as a whole reflects a legislative purpose of proscribing persistent and threatening social contact. We conclude that a person "follows" another within the meaning of the statute if he deliberately and repeatedly correlates his movements or appearances with another person's in order to have contact with the person. The evidence was sufficient to show that Lee followed Gross to her place of work.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n9 State v. Cann, 92 Wash. 2d 193, 197-98, 595 P.2d 912 (1979).

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Lee also contends there was insufficient evidence to show that Gross' fear of him was reasonable. n10 The determination of whether Gross' fear was reasonable was one for the finder of fact in light of "all the circumstances", including Lee's staring behavior, his repeated references in the notes to Gross' need for protection, and testimony that Lee's mother had warned Gross to avoid Lee and not to trust him. On this **[***10]** record the trial court's conclusion that Gross' fear was reasonable will not be disturbed.

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n10 RCW 9A.46.110(1)(b) ("The feeling of fear, intimidation, or harassment must be one that a reasonable person in the same situation would experience under all the circumstances".)

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**IV.**

Appellants contend the stalking statute is unconstitutionally overbroad. HN4↑Overbreadth doctrine creates a limited exception to the usual rule that a party "will not be heard to challenge [a] statute on the ground that it may conceivably be applied unconstitutionally to others, **[*307]** in other situations not before the Court." n11 Because striking down a statute based on facial overbreadth **[**165]** is exceptionally "strong medicine", n12 the doctrine applies only in the uniquely important realm of First Amendment rights

> Because of the important rights protected by the First Amendment, the overbreadth doctrine allows a litigant to challenge a statute on its face, rather than as applied to his own facts, and have a statute invalidated for **[***11]** overbreadth where it would be unconstitutional as applied to others even if not as applied to him. The doctrine is designed to short circuit the process by which a statute's constitutionality is addressed only on a case-by-case basis, thereby eliminating the chilling effect on legitimate First Amendment activity that would be created by leaving an unconstitutional statute on the books. n13

A statute that regulates conduct, as opposed to speech, will not be considered unconstitutionally overbroad unless its impact on First Amendment activities is "both real and substantial in relation to the [statute's] plainly legitimate sweep." n14

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n11 Broadrick v. Oklahoma, 413 U.S. 601, 610, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973).
n12 State v. Talley, 122 Wash. 2d 192, 210, 858 P.2d 217 (quoting Broadrick, 413 U.S. 601 at 613); but see State v. Walsh, 123 Wash. 2d 741, 749-50, 870 P.2d 974 (1994) (dismissing contention that impact on right to bear arms rendered statute overbroad); State v. Spencer, 75 Wash. App. 118, 127-28, 876 P.2d 939 (1994) (same); State v. McBride, 74 Wash. App. 460, 465, 873 P.2d 589 (applying overbreadth analysis in context of

constitutional "right to move about freely and the right to travel"). **[***12]**

n13 State v. Motherwell, 114 Wash. 2d 353, 370-71, 788 P.2d 1066 (1990) (citations omitted).
n14 O'Day v. King County, 109 Wash. 2d 796, 804, 749 P.2d 142 (1988).

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The stalking statute is plainly aimed at regulating conduct, rather than speech. Therefore, appellants' overbreadth challenge can succeed only upon a showing that the statute has a "substantial" effect on the exercise of First Amendment rights.

Appellants first attempt to demonstrate that the statute infringes on the right to travel and move freely in public **[*308]** places. They rely on a footnote in Tacoma v. Luvene n15 for the proposition that the right to travel is a First Amendment right which can trigger overbreadth analysis. Citing the United States Supreme Court's opinion in Papachristou v. Jacksonville, n16 the Luvene Court stated that "the right to walk, stroll, or wander aimlessly is a liberty 'within the sensitive First Amendment area' that is protected by the Fourteenth Amendment." n17

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n15 Tacoma v. Luvene, 118 Wash. 2d 826, 840 n. 5, 827 P.2d 1374 (1992). **[***13]**

n16 Papachristou v. Jacksonville, 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972).
n17 Luvene, 118 Wash. 2d at 840 n. 5 (quoting Papachristou, 405 U.S. at 164-65).

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Papachristou does not stand for the proposition that the right to wander freely is a First Amendment right. In Papachristou, the Court held that a statute prohibiting "wandering" was too vague to satisfy the demands of the due process clause. The Papachristou Court only mentioned the First Amendment once, in discussing the holding of another case. n18 We find no other authority for the proposition that the right to travel or move freely is a First Amendment right. n19

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n18 Papachristou, 405 U.S. at 165-66 (discussing Winters v. New York, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665 (1948)).
n19 Cf. Lutz v. City of York, 899 F.2d 255, 267 (3rd Cir. 1990) ("no constitutional text other than the Due Process Clauses could possibly create a right of localized intrastate movement"); Champagne v. Gintick, 871 F. Supp. 1527, 1533 n.5 (D.Conn. 1994) ("Any constitutional right of *intra* state travel, if one exists, is . . . not protected by the First Amendment.").

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Appellants also contend the statute is overbroad because it potentially infringes on a range of traditional First Amendment activities such as political protesting or newsgathering. One might "follow" another person in the course of these or other activities protected by the First

Amendment. In order to obtain a conviction under the statute, however, the State must show that

> The person being followed is intimidated, harassed, or placed in fear that the stalker intends to injure the person or property of the person being followed or of another person. The **[*309]** feeling of fear, intimidation, or harassment must be one that a **[**166]** reasonable person in the same situation would experience under all the circumstances . . . n20

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n20 RCW 9A.46.110(1)(b).

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The statute did not, before the 1994 amendment, define the term "harass". n21 A broad definition of "harass" would include a great deal of constitutionally protected activity. Reporters or protesters commonly pursue their activities with knowledge that they **[***15]** "vex, trouble, or annoy" n22 others. In order to avoid constitutional infirmity, however, the court may give the term a more narrow definition. n23 HN5 RCW 9A.46.020 provides that a person is guilty of "harassment" if the person threatens another and causes reasonable fear that the threat will be carried out. We conclude that a person is only "harassed" within the

one must feel fear in order to be "intimidated", as the term is commonly understood. n24

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n21 The 1994 amendment to the stalking statute defines "harassment" by reference to the civil anti-harassment statute, RCW 10.14.020. The Legislature has also added an explicit requirement that the "person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person." RCW 9A.46.110.
n22 See Webster's Third New International Dictionary 1031 (1966).
n23 Bellevue v. Miller, 85 Wash. 2d 539, 536 P.2d 603 (1975).
n24 See Webster's Third New International Dictionary 1184 (1966) ("intimidate": "to make timid or fearful: inspire or affect with fear").

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Thus read, the statute's impact on First Amendment activities is not substantial. It is conceivable that a reporter or protester could, in the course of following another with a legitimate First Amendment purpose, provoke a reasonable but mistaken sense of fear in the person being followed. But the risk of such misunderstandings is small. Any overbreadth in this regard may be addressed adequately on a case-by-case basis; it does not **[*310]** justify a prospective invalidation of the statute. n25 We conclude that the stalking statute is not unconstitutionally overbroad.

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n25 See Broadrick, 413 U.S. at 615-16; Motherwell, 114 Wash. 2d at 370-72.

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**V.**

Appellants next contend the stalking statute is unconstitutionally vague. HN6 A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice of what conduct the statute prohibits, or is so indefinite that it encourages arbitrary arrests and convictions. n26 This court approaches a vagueness challenge with a strong presumption **[***17]** in favor of the statute's validity. n27 The party challenging the constitutionality of a legislative enactment has the burden of proving it is unconstitutionally vague beyond a reasonable doubt. n28

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n26 Spokane v. Douglass, 115 Wash. 2d 171, 178, 795 P.2d 693 (1990); Kolender v. Lawson, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983).
n27 State v. Smith, 111 Wash. 2d 1, 5, 759 P.2d 372 (1988).
n28 State v. Maciolek, 101 Wash. 2d 259, 263, 676 P.2d 996 (1984).

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Lee contends the term "follows" is unconstitutionally vague, insofar as it is interpreted to apply to his conduct of repeatedly appearing at Gross' place of employment. We think that upon reading the statute, persons of ordinary intelligence would understand that "following" includes deliberately and repeatedly traveling to a location where another person routinely goes in order to see or watch that person. The term is not unconstitutionally vague.

Yates contends the phrase "without lawful authority" is **[***18]** unconstitutionally vague. In State v. Smith, n29 the Court held that the same phrase in Washington's anti-harassment statute did not render that statute impermissibly vague. The Smith Court determined that persons of ordinary intelligence could look to "readily ascertainable sources **[**167]** of law" to determine whether they have "lawful **[*311]** authority" to threaten or harass others. n30 While acknowledging there could be uncertainty as to the application of a "lawful authority" provision in various hypothetical situations, the Court declined to strike down the statute "merely because all of its possible applications cannot be specifically anticipated." n31

> Many criminal laws would be rendered void, and still more would be narrowed to the point of ineffectiveness, if we permitted the vagueness doctrine to be used
>
> > to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. n32

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n29 State v. Smith, 111 Wash. 2d 1, 759 P.2d 372 (1988). **[***19]**

n30 Smith, 111 Wash. 2d at 11.
n31 Smith, 111 Wash. 2d at 10.
n32 Smith, 111 Wash. 2d at 10 (quoting Colten v. Kentucky, 407 U.S. 104, 110, 32 L. Ed. 2d 584, 92 S. Ct. 1953 (1972)).

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In addition to the First Amendment, HN7 there are many identifiable sources of law which could give individuals "lawful authority" to follow others. n33 Persons of common intelligence may look to these sources to determine whether their behavior violates the stalking statute. In some situations, there may be room for debate as to whether certain behavior is "lawful" under statutory or common law authority. In light of Smith, this possibility does not render the statute unconstitutionally vague.

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n33 See, e.g., RCW 9.01.055 (granting citizens criminal and civil immunity when aiding a police officer); RCW 10.93.070 (defining powers of general authority peace officer); RCW 10.93.120 (peace officers' power to arrest); RCW 35.20.270 (powers of warrant servers).

Appellants also contend the statute is vague because it allows the finder of tact to base culpability on the perceptions of others, without requiring that the defendant act with a specific intent to cause harm. These factors do not render the statute unconstitutionally vague. The conduct proscribed by the statute is clear: One may **[*312]** not "follow" another person in such a way as to cause the person to experience a reasonable sense of fear. In order to convict, the State must show that the follower knew or reasonably should have known that his conduct was frightening. By definition, a person of normal intelligence would be able to consider "all the circumstances" and know whether his intentional following causes a sense of fear. The statute's reliance on an objective test precludes the conclusion that it is unconstitutionally vague." n34

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n34 See State v. Talley, 122 Wash. 2d 192, 213, 858 P.2d 217 (1993) ("Requiring the State to prove that the threats placed the victim in 'reasonable fear' provides an objective standard by which to evaluate the harm to the victim").

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**VI.**

Appellants contend the stalking statute violates procedural due process because it authorizes deprivation of a person's liberty interests without prior notice and hearing. RCW 9A.46.110 (4) provides:

> Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person.

In Appellants' view, this section effectively allows one person to obtain a "no-contact" order against another without the usual procedural requirements. n35

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n35 See RCW 26.50; RCW 10.14.080.

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The State contends Appellants have failed to allege any "state action" which could give rise to due process protections. n36 We disagree. The State's threat of criminal sanction for following the person "after being given actual notice that the person does not want to be contacted" n37 is sufficient "state action" to trigger due process analysis.

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(1989). [***22]

n37 RCW 9A.46.110(4).

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HN8 Generally, in looking at the degree of process that **[*313]** will be afforded in a particular case, the court balances the following **[**168]** interests; (1) the private interest to be protected; (2) the risk of erroneous deprivation of the interest by the government's procedures; and (3) the government's interest in maintaining the procedures. n38

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n38 Morris v. Blaker, 118 Wash. 2d 133, 144-45, 821 P.2d 482 (1992).

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Appellants do not show that HN9 prohibition of "stalking" intrudes on any substantial private interest. The risk of erroneous deprivation of liberty is minimal, as the statute can only be enforced upon a showing that the defendant's following behavior was intentional, and that it provoked a reasonable sense of fear. Appellants do not deny that the State has a strong interest in curtailing stalking behavior. The statute does not violate procedural due process.

In his reply brief, Yates contends **[***23]** RCW 9A.46.110(4) impermissibly shifts the

burden of persuasion as to an element of the charged crime. n39 This court generally does not consider issues raised for the first time by reply brief, as there is no opportunity for an opposing party to respond. n40 Neither party raised the burden-shifting issue below; it is not clear that the court in either case relied on section (4) of the statute in making its findings. Accordingly, we will not address this issue here.

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n39 See Sandstrom v. Montana, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979).
n40 State v. Manthie, 39 Wash. App. 815, 826 n. 1, 696 P.2d 33 (1985); State v. Pleasant, 38 Wash. App. 78, 81, 684 P.2d 761 (1984); State v. Alton, 89 Wash. 2d 737, 739, 575 P.2d 234 (1978); see RAP 10.3(c).

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**VII.**

Yates contends the **stalking** statute violates equal protection by creating a "special allowance" for **private detectives.** HN10 RCW 9A.46.110(3) provides:

> It shall be a defense to the crime of **stalking** that the defendant **[***24]** is a licensed **private detective** acting within the capacity of his or her license as provided by chapter 18.165 RCW.

**[*314]** Because the exclusion for licensed **private detectives** does not implicate a fundamental right or a suspect class, equal protection requires only that the distinction have a "rational basis". n41 The statutory exemption for licensed private detectives is presumably based on the Legislature's conclusion that these individuals pose relatively little threat of harm to the people they follow. In view of the fact that private investigators are subject to other state regulations, the statutory distinction is not irrational. n42

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n41 State v. Coria, 120 Wash. 2d 156, 171, 839 P.2d 890 (1992).
n42 See RCW 18.165.010 et. seq.

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Both convictions are affirmed.

Becker, J.

WE CONCUR:

Grosse, J.

Coleman, J.

Source: Legal > Cases - U.S. > **Federal & State Cases, Combined**
Terms: stalk! and (investigator or detective) (Edit Search)
Focus: **stalk! w/25 (private w/5 investigator or detective)** (Exit FOCUS™)
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* Signal Legend:
- Warning: Negative treatment is indicated
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*410 Pa. 192, *; 189 A.2d 147, **;*
*1963 Pa. LEXIS 587, ****

Forster, Appellant, *v.* Manchester.

The Supreme Court of Pennsylvania

410 Pa. 192; 189 A.2d 147; 1963 Pa. LEXIS 587

Argued November 21, 1962
March 19, 1963

**PRIOR HISTORY: [***1]**

Appeal, No. 315, Jan. T., 1962, from decree of Court of Common Pleas No. 1 of Philadelphia County, Sept. T., 1960, No. 2433, in case of Isobel Forster, a minor, by her husband, Norman Forster, and Norman Forster in his own right v. Michael J. Manchester. Decree affirmed.

Equity. Before HAGEN, P.J.

Adjudication filed dismissing complaint, plaintiff's exceptions to adjudication dismissed and final decree entered. Plaintiffs appealed.

**DISPOSITION:** Decree affirmed at appellant's costs.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Appellant, a car accident victim, sought review of a decision of a Pennsylvania trial court, which dismissed her complaint against appellee detective for unwarranted invasion of privacy and intentionally inflicted severe emotional distress.

**OVERVIEW:** The victim was involved in a car accident with another person. The other person's insurer obtained the assistance of the private detective who assigned a team of two men to conduct surveillance of the victim, which she alleged caused her severe emotional distress. The victim filed a complaint in equity seeking an injunction against further surveillance and for money damages. The trial court entered a decree denying her claim, from which she appealed. On review, the court affirmed the decision because the detective's conduct was reasonable. The court found that it was in the best interests of society that valid claims be ascertained and fabricated claims be exposed. The court held that following the victim during her daily activities and recording her movements on film was consonant with that social purpose. The surveillance was conducted by experienced investigators who did not use improper techniques. Moreover, there was no trespassing on her property nor spying through her windows. The court held that under the facts and circumstances, the victim's right to privacy was not invaded and that the detective did not intend to cause her severe emotional distress.

**OUTCOME:** The court affirmed the decision that the victim's privacy was not invaded and that the detective did not intend to intentionally inflict severe emotional distress.

**CORE TERMS:** surveillance, investigator, film, right of privacy, traffic, supplied, severe emotional distress, private detective, personal injuries, illustration, whereabouts, exposed, camera, invasion of privacy, emotional distress, right to privacy, motion pictures, sole purpose, embarrassment, intentionally, exaggerated, unwarranted, experienced, conducting,

suffering, contacted, invasion, notified, licensed, distance

**LexisNexis (TM) HEADNOTES - Core Concepts -** ◆ Hide Concepts

Torts > Defamation & Invasion of Privacy > Intrusion
Torts > Defamation & Invasion of Privacy > Public Disclosure of Private Facts
HN1 A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other. More Like This Headnote

Torts > Defamation & Invasion of Privacy > Intrusion
Governments > State & Territorial Governments > Licenses
HN2 The Private Detective Act of 1953 defines the business of a licensed private detective to include investigations of the identity, habits, conduct, movements, whereabouts of any person and authorizes the securing of evidence to be used in the trial of civil cases. More Like This Headnote

Torts > Intentional Torts > Intentional Infliction of Emotional Distress
Torts > Intentional Torts > Prima Facie Tort
HN3 One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable for such emotional distress. More Like This Headnote

Torts > Intentional Torts > Intentional Infliction of Emotional Distress
Torts > Intentional Torts > Prima Facie Tort
HN4 The requisite intention to cause severe emotional distress is met when the act is done with knowledge on the part of the actor that severe emotional distress is substantially certain to be produced by his conduct. It is further stated that the rule [illegible] reasonable bounds of decency. Generally, the case is one in which the recitation of the facts to an average member of the community arouses his resentment against the actor and leads him to exclaim "outrageous." More Like This Headnote

**COUNSEL:** *Sheldon L. Albert,* with him *James E. Beasley,* and *Beasley & Ornsteen,* for appellants.

*Ralph P. Higgins,* with him *Harper, George, Buchanan and Driver,* for appellee.

**JUDGES:** Before BELL, C.J., MUSMANNO, COHEN, EAGEN and O'BRIEN, JJ.

**OPINIONBY:** COHEN

**OPINION: [*193] [**148]** OPINION BY MR. JUSTICE COHEN

The main issues in this case are whether appellee's conduct constitutes an unwarranted invasion of privacy or, alternatively, whether appellee intentionally inflicted severe emotional distress under § 46 of the Restatement of Torts.

On July 30, 1960, plaintiff-appellant, Isobel Forster, was involved in an automobile accident with one Francis Martin. Counsel for appellant **[***2]** notified Martin's insurance carrier, the Guardian Mutual Insurance Company (Guardian), and the Hays Adjustment Bureau (Hays), an independent adjustment bureau retained by Guardian, of his representation of Mrs. Forster. With the knowledge of Guardian, Hays retained defendant-appellee, Michael Manchester, a licensed private detective, to make an "activity report" on appellant. **[*194]** An "activity report" is an investigation of the subject's daily activities used to ascertain the

extent to which the subject has freedom of movement over his limbs. Appellee conducted the surveillance by assigning a team of two men equipped with motion picture cameras to report on the every-day activities and movements of the subject.

The first day that appellee's investigators were observed by appellant was September 15. On that day, from 8:00 a.m. until 5:30 p.m., appellee's investigators conducted a surveillance of the vicinity where appellant resided. When appellant went out in her automobile, they observed her whereabouts **[**149]** by following her in separate cars, keeping in touch with each other by two-way radio. The purpose of this particular assignment was to make a log of the **[***3]** places where appellant stopped. Appellee's investigator Smith n1 testified that he normally stayed at least a block behind appellant's car, as he stated, at "what I thought would be a safe distance [so] that the wouldn't observe me." During the course of the day Smith occasionally lost sight of appellant's car in traffic. At one time, after appellant disappeared from Smith's view, she suddenly emerged from traffic and passed by him at a distance of no more than ten or fifteen feet. At that time appellant noticed a camera in Smith's hand. n2 A short while later in the same day, Smith had difficulty following appellant's small Volkswagon in traffic and before he realized it his car was almost alongside of appellant's automobile. Recognizing Smith as the man with the camera, she became frightened and attempted to evade him in traffic. Once again during the course of the **[*195]** day's surveillance appellant's car passed Smith's automobile, thereby frightening appellant. As a result of being followed by appellee's investigators, appellant became extremely nervous and upset, causing her to have frequent nightmares and hallucinations which required medical treatment.

n1 Smith was a retired police lieutenant with twenty years of service on the police force.

the record as to who viewed these films. **[***4]**

Appellant advised her attorney about the September 15th incident and gave him the license number of Smith's vehicle. Appellant's attorney contacted Guardian and Hays to determine whether they were responsible for having appellant surveilled. They denied any knowledge of such conduct. Appellant's attorney then contacted appellee who admitted that he was conducting the surveillance but refused to reveal the identity of his client, stating that the investigation was being performed for a legitimate purpose and that the identity of his client was a privileged communication. At this time, appellant's attorney sent a letter to Manchester informing him that his client was suffering "grievous mental pain and suffering" as a result of being followed. He also informed Manchester that the conduct of Manchester's investigators constituted a violation of appellant's right of privacy. Manchester ignored this letter since, as he later testified, he had seen so many exaggerated claims in the past that he "took it with a grain of sait." The surveillances continued, and appellant was aware of being followed on four separate occasions prior to the commencement of this action.

In her complaint **[***5]** in equity appellant prayed for an injunction against further surveillances and for money damages. After hearing testimony the court below entered a decree denying appellant's claim. An appeal was then taken to this Court.

Preliminarily, it should be noted that the issues involved in this case are so interrelated that much of what is said with respect to the right of privacy is **[*196]** also applicable to the intentional infliction of emotional distress. Judicial recognition of a cause of action for the unwarranted invasion of one's right of privacy is of comparatively recent vintage. In an exhaustive opinion by Judge WOODSIDE the judicial development of the tort is traced. See *Aquino v. Bulletin Company*, 190 Pa. Superior Ct. 528, 154 A.2d 422 (1959). n3 Although the lines and contours of the tort are not yet sharply defined, perhaps the best definition of the action is given in section 867 of the Restatement of Torts where the rule is stated as follows:

"HN1 A person who *unreasonably* and seriously interferes with *another's interest* **[**150]** *in not having his affairs known to others* or his likeness exhibited to the public is liable to the other." (Emphasis **[***6]** supplied). It is therefore necessary for us to determine the extent of the interest to be protected and the reasonableness of appellee's conduct.

n3 For a general summary see McClelland, The Right of Privacy in Pennsylvania, 28 Pa. B.A.Q. 279 (1957); Feinberg, Recent Developments in the Law of Privacy, 48 Colum.L.Rev. 713 (1948); Nizer, The Right of Privacy: A Half Century's Development, 39 Mich.L.Rev. 526 (1941).

In determining the extent of the interest to be protected, we must take cognizance of the fact that appellant has made a claim for personal injuries. n4 Although the so-called "public figure" n5 limitation upon the right to privacy has generally been applied to such persons as actors, public officials, and other newsworthy persons, its rationale also applies to a person who makes a claim for personal injuries. It is not uncommon for defendants in accident cases to employ investigators to check on the validity of claims against them. Thus, by making a claim for personal injuries appellant must **[*197]** expect reasonable inquiry and investigation to be made of her claim and to this extent her interest in privacy is circumscribed. It should also be noted that **[***7]** all of the surveillances took place in the open on public thoroughfares where appellant's activities could be observed by passers-by. To this extent appellant has exposed herself to public observation and therefore is not entitled to the same degree of privacy that she would enjoy within the confines of her own home.

the insurance company of her claim.

n5 See *Hull v. The Curtis Publishing Company*, 182 Pa. Superior Ct. 86, 90, 125 A.2d 644, 650 (1956).

Moving to the question of whether appellee's conduct is reasonable, we feel that there is much social utility to be gained from these investigations. It is in the best interests of society that valid claims be ascertained and fabricated claims be exposed. n6 The legislature recognized the importance of these investigative activities in HN2 The Private Detective Act of 1953 when it defined the business of a licensed private detective to include investigations of the "identity, habits, conduct, movements, whereabouts ... of any person" and, in another subsection when it authorized the "securing of evidence to be used ... in the **[***8]** trial of civil ... cases." n7 Certainly, following the subject during her daily activities and recording on film her movements and whereabouts is consonant with the wording of the Act and the aforementioned social purpose.

n6 We are referring to the general policy behind these investigations and not to the validity of appellant's particular claim.

n7 Act of August 21, 1953, P.L. 1273, § 2(b)(2) and (10), 22 P.S. § 12(b)(2) and (10).

There was nothing unreasonable in the manner in which appellant was followed nor in the taking of motion pictures. In regard to the surveillance, it was conducted by experienced investigators who did not use improper techniques. Investigator Smith testified that he tried to stay at least a block behind appellant in his automobile. The few times on September 15

when **[*198]** Smith was observed by appellant were not intentional but purely inadvertent. During the course of an extended automobile surveillance in heavy traffic, it is not an unreasonable occurrence for an investigator's vehicle to pass close by the vehicle he is following. In fact, it was in the investigator's best interests to remain as unobstrusive as possible because **[***9]** if the subject were aware of his presence she would not behave in a natural manner. Moreover, there was no trespassing on appellant's property nor spying through her windows as is present in the cases cited by appellant. n8

n8 See e.g., *Souder v. Pendleton Detectives*, 88 So.2d 716 (La. 1956).

As to the motion pictures, they were a reasonable means of securing evidence to be used at trial. While in the typical case **[**151]** of invasion of privacy, an unauthorized uncomplimentary photograph is given widespread publication causing great humiliation and embarrassment to the subject, n9 in the instant case there was no evidence as to what use was made of the films. There is no evidence to indicate that the films contained embarrassing pictures of appellant, nor is there any evidence in the record as to who viewed these films. The sole purpose of taking these films was to record appellant's movements and daily activities, and if these films disclosed inconsistencies in appellant's claim, any embarrassment suffered by her would be justified.

n9 See Restatement, Torts § 867, illustrations 4 and 6.

Counsel for appellant maintains that the defense of social utility **[***10]** is not available to appellee since the insurance company's out-of-court denial of responsibility served as a

successfully an assignment it is essential that the identity of his client remain secret. See Act of August 21, 1953, P.L. 1273, § 14, 22 P.S. § 24. Hence, it would have **[*199]** frustrated the purpose of the investigation for Guardian to admit that it was responsible for the surveillance. Furthermore, even if Guardian were deemed to have waived its rights, we doubt whether others would be precluded from raising this defense because of the social value of such conduct.

We therefore hold that the facts and circumstances as herein described do not establish that appellant's right to privacy has been invaded.

Turning next to appellant's claim that the conduct of appellee is actionable under the 1948 revision of the Restatement of Torts, we conclude that the facts of this case do not support this contention. Section 46 of the Restatement of Torts states: "*HN3*One who, without a privilege to do so, *intentionally* causes severe emotional distress to another is liable ... for such emotional **[***11]** distress." (Emphasis supplied).

In comment a to this section it is stated that *HN4*the requisite intention is met when the act is done "with knowledge on the part of the actor that *severe emotional distress is substantially certain to be produced* by his conduct." (Emphasis supplied). It is further stated in comment g that the rule imposes liability "in those situations in which the actor's conduct has gone beyond all reasonable bounds of decency. ... Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim *'Outrageous.'*" (Emphasis supplied).

The court below properly found that appellee, Manchester, did not intend to cause severe emotional distress to appellant. When appellee received the letter from appellant's counsel stating that she was suffering grievous emotional distress as a result of the surveillances, he

took it with a "grain of salt" since he had been exposed to so many exaggerated claims in the **[*200]** past. n10 Considering the fact that he was never given any amplifying information as to the nature and severity of appellant's nervous disturbance, **[***12]** Manchester, as an experienced and case-hardened private detective conducting an activity surveillance in a perfectly legitimate manner, quite naturally felt that this letter was merely a ruse to halt his investigation. His sole purpose was to do his job and not to cause emotional distress to appellant. Under these circumstances, the clear-cut intent required by the Restatement was not established. In addition, the conduct of appellee cannot be considered "Outrageous," as that term is used in comment g of the Restatement. The comment **[**152]** and illustrations n11 point to acts of an especially flagrant character, and not to conduct having social value as is present in this case. See Restatement, Torts § 46, comments d and e (1948 Supp.).

n10 Since the lower court found for appellee, all testimony and inferences therefrom must be resolved in his favor.

n11 As an example, illustration 1 of Restatement, Torts § 46 (Supp. 1948) stated: "As a practical joke, A falsely tells B that he has read in the paper that her son, C. who is a paratrooper in a division known to be then participating in an invasion of enemy territory in wartime, has been reported killed in action. B grieves over the supposed death of C. A is liable for the grief which he causes her." **[***13]**

Although we sympathize with the plight of appellant, the social value resulting from investigations of personal injury claims and the absence of any wilfulness on the part of appellee require us to deny redress in this case. n12

n12 Appellant also raises an evidentiary point which, even if correct, does not constitute prejudicial error.

Mr. Justice MUSMANNO and Mr. Justice EAGEN dissent.

LEXSEE 602 So 2d 385

**Billy Johnson v. Corporate Special Services, Inc.**

**1910566**

**SUPREME COURT OF ALABAMA**

***602 So. 2d 385; 1992 Ala. LEXIS 715***

**July 31, 1992, Released**

**SUBSEQUENT HISTORY:**
[**1] Released for Publication August 21, 1992. As Corrected November 24, 1992.

**PRIOR HISTORY:**
Appeal from Jefferson Circuit Court. (CV-89-7054)

**DISPOSITION:**
AFFIRMED.

CASE SUMMARY

**PROCEDURAL POSTURE:** Plaintiff workers' compensation claimant sought review of an order of the Jefferson Circuit Court (Alabama), which granted summary judgment dismissing plaintiff's action for invasion of privacy against defendant private investigation firm.

**OVERVIEW:** Plaintiff workers' compensation claimant was injured at work and filed a claim for disability benefits. An insurance company providing workers' compensation coverage to plaintiff's employer hired defendant private investigation firm to investigate the validity of plaintiff's claim. Defendant's investigator parked outside plaintiff's house to observe plaintiff's outside activity. At no time did the investigator attempt to observe plaintiff inside his house. Plaintiff brought an action alleging that defendant invaded his privacy. The trial court entered an order granting summary judgment in favor of defendant. On appeal, the court affirmed the judgment. The court held that plaintiff failed to establish that defendant wrongfully intruded upon his interest in solitude or seclusion. The court held that an individual asserting a claim for a personal injury must have expected a reasonable amount of investigation into his physical incapability and that defendant had a legitimate purpose for its investigation. The court further held that defendant's observations were not unduly intrusive because plaintiff's activities outside his home could have been observed by any passerby.

**OUTCOME:** The court affirmed the summary judgment dismissing plaintiff workers' compensation claimant's action for invasion of privacy against defendant private investigation firm. The court held that defendant had a legitimate purpose for its investigation and that were not unduly intrusive.

CORE CONCEPTS

***Torts : Defamation & Invasion of Privacy***
The wrongful intrusion into one's private activities constitutes a tort known as the invasion of privacy. The four distinct wrongs of the tort of invasion of privacy are: 1) the intrusion upon the plaintiff's physical solitude or seclusion; 2) publicity that violates the ordinary decencies; 3) putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; and 4) the appropriation of some element of the plaintiff's personality for a commercial use.

***Torts : Defamation & Invasion of Privacy***
The tort of invasion of privacy may occur both where there is a public and commercial use or publication and where there is a wrongful intrusion into one's private activities or solitude or seclusion.

***Torts : Defamation & Invasion of Privacy***
There are two standards to find whether there has been a tort of invasion of privacy: 1) If there has not been public or commercial use or publication, then the proper standard is whether there has been an intrusion upon the plaintiff's physical solitude or seclusion, or a wrongful intrusion into one's private activities in such manner so

as to outrage or to cause mental suffering, shame, or humiliation to a person of ordinary sensibilities; and 2) if there has been public or commercial use or publication of private information, then the proper standard is whether there has been unwarranted publicity, unwarranted appropriation or exploitation of one's personality, publication of private affairs not within the legitimate concern of the public, an intrusion into one's physical solitude or seclusion, the placing of one in a false but not necessarily defamatory position in the public eye, or an appropriation of some element of one's personality for commercial use.

***Torts : Defamation & Invasion of Privacy : Intrusion***
The "wrongful intrusion" prong of the tort of invasion of privacy is defined as the intentional interference with another's interest in solitude or seclusion, either as to his person or to his private affairs or concerns. There must be something in the nature of prying or intrusion and the intrusion must be something that would be offensive or objectionable to a reasonable person. The thing into which there is intrusion or prying must be, and be entitled to be, private. Two primary factors are considered in determining whether or not an intrusion that effects access to private information is actionable. The first is the means used. The second is the defendant's

***Torts : Defamation & Invasion of Privacy***
Plaintiffs in personal injury claims must expect reasonable inquiry and investigation to be made of their claims and that to this extent their interest in privacy is circumscribed. The investigation of the plaintiffs, however, must not be pursued in an offensive or improper manner.

***Torts : Defamation & Invasion of Privacy***
When a plaintiff makes a personal injury claim, thereby subjecting himself or herself to public observation, he or she is not entitled to the same degree of privacy that he or she would enjoy within the confines of his or her own home.

**COUNSEL:**
Appellant: Jeffrey W. Bennitt of Kizer & Bennitt, Birmingham.

Appellee: John W. Clark, Jr., Judith E. Dolan, and Amy K. Myers of Clark & Scott, P.C., Birmingham, for Appellee Corporate Special Services, Inc.

**JUDGES:**
MADDOX, Hornsby, Shores, Houston, Kennedy

**OPINIONBY:**
MADDOX

**OPINION:**

**[*386]** MADDOX, JUSTICE.

The issue is whether the trial court erred by entering a summary judgment on behalf of the defendant on a claim that the defendant invaded the plaintiff's privacy while investigating a workman's compensation claim in which the plaintiff claimed physical disability. We agree with the holding of the trial court.

The plaintiff, Billy Johnson, was injured when he fell at work. Johnson filed for workman's compensation benefits against his employer, claiming that he was over 50% impaired in his ability to work. His employer was insured for workman's compensation claims by St. Paul Fire & Marine Insurance Company ("St. Paul"), which hired Corporate Special Services, Inc. ("Corporate"), to investigate the validity of Johnson's disability claim.

Tim Jirgens, an employee of Corporate, was assigned to Johnson's case. n1 He parked outside Johnson's house to observe Johnson's outside activity. He specifically observed whether Johnson participated in any physical [illegible] activity that would tend to disprove his workman's compensation claim that he was more than 50% disabled. At no time did Jirgens attempt to observe Johnson inside his house.

n1 It is undisputed that Jirgens watched Johnson for only one day.

During Jirgens's surveillance of Johnson, Jirgens was pulled over by the police and questioned about why he was prowling in the neighborhood. After Jirgens explained the situation to the officers, he changed his surveillance location and backed into a driveway, facing Johnson's house. Johnson noticed Jirgens because of the commotion with the police and pulled his car in front of the driveway, blocking Jirgens's exit; he then walked up to Jirgens's vehicle, and the two men began arguing. The argument ended when Jirgens pulled out a gun n2 and maneuvered his way out of the driveway and drove away.

n2 It was disputed whether Jirgens aimed the gun at Johnson or just showed him the gun.

[**3]

Johnson sued St. Paul and Corporate for assault and battery and invasion of privacy. The trial court entered a summary judgment on behalf of St. Paul on both claims and on behalf of Corporate on the invasion of privacy claim. The assault and battery claim against Corporate went to trial; the jury found in favor of Corporate. Johnson appeals only the summary judgment [*387] on the invasion of privacy claim against Corporate.

This Court recognizes that the wrongful intrusion into one's private activities constitutes a tort known as the invasion of privacy. *Alabama Electric Co-Operative, Inc. v. Partridge, 284 Ala. 442, 445, 225 So. 2d 848, 851 (1969).* This Court in *Norris v. Moskin Stores, Inc., 272 Ala. 174, 132 So. 2d 321 (1961),* following W. Prosser, Law of Torts, pp. 637-39 (2d ed. 1955), set out the "four distinct wrongs" of the tort of invasion of privacy:

"1) the intrusion upon the plaintiff's physical solitude or seclusion; 2) publicity which violates the ordinary decencies; 3) putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; and 4) the appropriation of some element [**4] of the plaintiff's personality for a commercial use."

*1988).*

The tort of invasion of privacy may occur both where there is a public and commercial use or publication and where there is a wrongful intrusion into one's private activities or solitude or seclusion. *Hogin, 533 So. 2d at 530,* citing *Norris, 272 Ala. at 176, 132 So. 2d at 322-23.* There are two standards the Court uses to find whether there has been a tort of invasion of privacy:

"1) If there has not been public or commercial use or publication, then the proper standard is whether there has been an 'intrusion upon the plaintiff's physical solitude or seclusion,' or a 'wrongful intrusion into one's private activities in such manner so as to outrage or to cause mental suffering, shame or humiliation to a person of ordinary sensibilities;' and 2) if there has been public or commercial use or publication of private information, then the proper standard is whether there has been 'unwarranted publicity,' 'unwarranted appropriation or exploitation of one's personality,' publication of private affairs [**5] not within the legitimate concern of the public, an intrusion into one's 'physical solitude or seclusion,' the placing of one in a 'false but not necessarily defamatory position in the public eye,' or an 'appropriation of some element of [one's] personality for commercial use.'"

*Hogin, 533 So. 2d at 530-531* (citations omitted). (Emphasis added.) See also, *Smith v. Doss, 251 Ala. 250, 37 So. 2d 118 (1948).*

Johnson argues that he presented sufficient evidence to the trial court to prove that Corporate invaded his right to privacy. We must review the evidence according to the standards set out by this Court to determine if the invasion was "wrongful." In Hogin, this Court said:

"The 'wrongful intrusion' prong of the tort of invasion of privacy has been defined as the 'intentional interference with another's interest in solitude or seclusion, either as to his person or to his private affairs or concerns.' W. Prosser & W. Keeton, The Law of Torts, p. 851 (5th ed. 1984). 'There must be something in the nature of prying or intrusion' and 'the intrusion must be something which would be offensive or objectionable to a reasonable [**6] person. The thing into which there is intrusion or prying must be, and be entitled to be, private.' Id. at 855. Two primary factors are considered in 'determining whether or not an intrusion which effects access to private information is actionable. The first is the means used. The second is the defendant's purpose for obtaining the information.' Id. at 856."

*Hogin, 533 So. 2d at 531*

It is imperative that this Court first determine the purpose for the investigation and whether the "thing ... into which there was an intrusion or prying ... [was] entitled to be private." *Hogin, 533 So. 2d at 531.* In Partridge, this Court noted, with approval, that plaintiffs in personal injury claims "'must expect reasonable inquiry and investigation to be made of [their] claims and [that] to this extent [their] interest in privacy is circumscribed." *Partridge, 284 Ala. at 445, 225 So. 2d at 851,* quoting *Forster v. Manchester, 410 Pa. 192, 189 A.2d 147 (1963).* See *Hogin, 533 So. 2d at 531.* The investigation [*388] of the plaintiffs, however, must not be pursued in [**7] an offensive or improper manner. Id.

In this case, the predominant issue in the workman's compensation case was the extent of Johnson's injury. Johnson, therefore, should have expected a reasonable amount of investigation into his physical incapability. This Court finds that the purpose of the investigation was legitimate; therefore, the only issue remaining is whether the means used was offensive or objectionable.

In Partridge, this Court cited, with approval, the Pennsylvania opinion Forster v. Manchester, which held that when a plaintiff makes a personal injury claim, thereby subjecting himself or herself to public observation, he or she is "'not entitled to the same degree of privacy that he or she would enjoy within the confines

of [his or] her own home.'" *Partridge, 284 Ala. at 445, 225 So. 2d at 851,* quoting *Forster, 410 Pa. at 197, 189 A.2d at 150.* (Emphasis added.) Jirgens observed Johnson while Johnson was outside his home, in his front yard, where he was exposed to the public. At no time did Jirgens intrude upon Johnson's privacy inside Johnson's own home. This Court finds that because Johnson's **[**8]** activities in his front yard could have been observed by any passerby, Corporate's intrusion into Johnson's privacy was not "wrongful" and, therefore, was not actionable.

We affirm the summary judgment for Corporate on the invasion of privacy claim.

AFFIRMED.

Hornsby, C.J., and Shores, Houston, and Kennedy, JJ., concur.

*231 N.J. Super. 251, *; 555 A.2d 663, **;*
*1989 N.J. Super. LEXIS 84, ****

BARBARA FIGURED, WILLIAM FIGURED AND JASON FIGURED, PLAINTIFFS-APPELLANTS AND CROSS-RESPONDENTS, v. PARALEGAL TECHNICAL SERVICES, INC., RONAL F. AUSTIN AND RONALD E. FREEMAS, DEFENDANTS-RESPONDENTS AND CROSS-APPELLANTS

No. A-2331-87T7

Superior Court of New Jersey, Appellate Division

231 N.J. Super. 251; 555 A.2d 663; 1989 N.J. Super. LEXIS 84

January 18, 1989, Argued
February 23, 1989, Decided

**NOTICE:**
**[***1]**
Approved for Publication March 22, 1989.

**PRIOR HISTORY:**

On appeal from the Superior Court of New Jersey, Law Division, Warren County.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Plaintiff claimant sought review from the judgment of the Superior Court of New Jersey, Warren County, which granted defendant investigators' motion for summary judgment because it concluded based on undisputed facts and all reasonable inferences derived therefrom no cause of action had been established. Plaintiff had sought damages for invasion of privacy and both negligent and intentional infliction of emotional distress.

**OVERVIEW:** Plaintiff claimant commenced an action against defendant investigators and their employer seeking damages for invasion of privacy and negligent and intentional infliction of emotional distress as a result of their surveillance of her. Defendants had been retained by a liability carrier after plaintiff had been in an automobile accident and as a result had claimed to have suffered physical, emotional, and psychological injuries. The trial court granted summary judgment in favor of defendants holding that no cause of action had been established. The court affirmed the trial court's judgment and held that the trial judge did not err in determining that there was insufficient evidence as a matter of law to present the emotional distress claims to a jury, either negligently or intentionally inflicted. The court stated that an individual who sought to recover damages for alleged injuries had to expect that her claim would be investigated, and that although the investigation could not involve an intrusion that could be deemed highly offensive to a reasonable person, it concluded that the facts revealed no objectively unreasonable or highly offensive conduct by defendants.

**OUTCOME:** The court affirmed the trial court's judgment and concluded that the trial judge did not err in determining that there was insufficient evidence as a matter of law to present the emotional distress claims to a jury. The court stated that plaintiff claimant, who sought to recover damages for alleged injuries, had to expect that her claim would be investigated.

**CORE TERMS:** emotional distress, summary judgment, intrusion, seclusion, intentional infliction of emotional distress, offensive, privacy, noticed, severe, reasonable man, parked, matter of law, thoroughfare, claimant, Law Division, invasion of privacy, reasonable person, cause of action, parking lot, surveillance, walked, pulled, mile, absence of physical injury, proximate cause, drove past, public eye, case law, outrageous, actionable

**LexisNexis (TM) HEADNOTES - Core Concepts - ✦ Hide Concepts**

Torts > Intentional Torts > Intentional Infliction of Emotional Distress
Torts > Negligence > Duty > Negligent Infliction of Emotional Distress

*HN1* Recovery for negligent infliction of emotional distress seems to be permitted, even in the absence of physical injury to the plaintiff, under circumstances where there was a "sufficient guarantee" of the "genuineness" of the claim and the emotional distress was sufficiently "severe," such as involving actual observation of severe injury or death to a loved one. In order to establish a claim for intentional infliction of emotional distress, the plaintiff must establish intentional and outrageous conduct by the defendant, proximate cause and distress that is severe. More Like This Headnote

Torts > Intentional Torts > Intentional Infliction of Emotional Distress

*HN2* To establish intentional infliction of emotional distress, initially, the plaintiff must prove that the defendant acted intentionally or recklessly. For an intentional act to result in liability, the defendant must intend both to do the act and to produce emotional distress. Liability will also attach when the defendant acts recklessly in deliberate disregard of a high degree of probability that emotional distress will follow. Second, the defendant's conduct must be extreme and outrageous. The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Third, the defendant's action must have been the proximate cause of the plaintiff's emotional distress. Fourth, the emotional distress suffered by the plaintiff must be so severe that no reasonable man could be expected to endure it. More Like This Headnote

Torts > Intentional Torts > Intentional Infliction of Emotional Distress

*HN3* The severity of the emotional distress raises questions of both law and fact. Thus, the court decides whether as a matter of law such emotional distress can be found, and the jury decides whether it has in fact been proven. When conduct is directed at a third party, proof of bodily harm is required, but when the intentional conduct is directed at the plaintiff, he or she need not prove any physical injury. It suffices that the conduct produce emotional distress that is severe. More Like This Headnote

Torts > Defamation & Invasion of Privacy

*HN4* The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied by the common name, but otherwise have almost nothing in common, commercial appropriation of one's name or likeness, intrusion, public disclosure of private facts, and publicity which places the plaintiff in a false light in the public eye. More Like This Headnote

Torts > Defamation & Invasion of Privacy

HN5 One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person. A defendant is subject to liability only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. There is no liability for observing the plaintiff or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye. There is likewise no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct which the reasonable man would strongly object. More Like This Headnote

Torts > Defamation & Invasion of Privacy

HN6 The thrust of the aspect of a tort that the intrusion be highly offensive is, in other words, that a person's private, personal affairs should not be pried into. The converse of this principle is, however, of course, that there is no wrong where defendant did not actually delve into plaintiff's concerns, or where plaintiff's activities are already public or known. More Like This Headnote

Torts > Defamation & Invasion of Privacy

HN7 Whatever the public may see from a public place cannot be private. More Like This Headnote

**COUNSEL:** *Daniel J. Yablonsky* argued the cause for appellants (*Courter, Kobert, Laufer, Purcell* and *Pease*, attorneys, *Robert A. Smith* on the brief).

*Millet* and *Kathleen Suleiman*, on the brief).

**JUDGES:** Pressler, Scalera and Stern. The opinion of the court was delivered by Stern, J.A.D.

**OPINIONBY:** STERN

**OPINION: [*252] [**663]** Plaintiff commenced this action against two investigators and the corporation which employed them. n1 The complaint alleged, **[**664]** among other things, that defendants' surveillance of her activities invaded her privacy and caused her severe emotional distress. Plaintiff sought damages for invasion of privacy and **[*253]** both negligent and intentional infliction of emotional distress. A judge of the Law Division concluded that, based on the undisputed facts and all reasonable inferences derived therefrom, no cause of action had been established and granted defendants' motion for summary judgment. We now affirm the judgment of the Law Division. **[***2]** n2

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 A settlement was reached with other defendants named in the complaint. However, the record before us does not contain an order amending the complaint to name the individual defendants who were originally identified as John Doe and Richard Roe. The parties agree that we here deal with a final judgment as the matter has been disposed of as to all parties, and we proceed on that basis. Further, in light of the then outstanding claims which were resolved by the motion for summary judgment involved in this appeal, we treat Barbara Figured as the sole plaintiff.

n2 In light of our disposition, we bypass certain procedural questions raised on the cross-

appeal related to the timeliness of the motion for reconsideration which was granted before the motion judge adhered to his original decision granting summary judgment.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

I.

Plaintiff was in an automobile accident on January 23, 1983 as a result of which she claimed to have suffered physical, emotional and psychological injuries. The liability carrier for the **[***3]** other vehicle involved in the accident retained defendant Paralegal Technical Services, Inc. to investigate plaintiff's injury claims and Paralegal assigned the investigation to the individual defendants, their employees.

Plaintiff complains in particular about two separate incidents which occurred during defendants' surveillance. The first occurred on the morning of June 6, 1984. Plaintiff received a telephone call from a neighbor who said that she had noticed two suspicious-looking vehicles going up and down the road in front of plaintiff's home. Later, when plaintiff left her home with her mother to keep a doctor's appointment, she noticed two cars parked in a wooded area near the road and saw two men standing alongside the road, watching her as she left. As plaintiff drove to her appointment, she noticed that both cars were following her. Eventually, plaintiff pulled into the parking lot of a store about five miles from her home and noticed that the two cars had followed her into the parking lot. The driver of one car parked in the back of the store and then walked around the front of plaintiff's car, looking "straight into [her] face" while "within arms reach" of her. **[***4]** He "kept peering" **[*254]** at plaintiff and walked very slowly, "staring" as he passed, but said nothing to her.

The second incident occurred on September 11, 1985. Plaintiff left a family birthday party in Scranton, Pennsylvania, and drove onto Route 380 [illegible] vehicles involved in the June 6, 1984 incident was again following her. The vehicle proceeded to follow plaintiff closely for over forty miles until she pulled into a rest area. After plaintiff stopped, she noticed that the other vehicle had "pulled around" and parked facing her.

The motion judge granted summary judgment in favor of defendants on the issue of negligent infliction of emotional distress because he found that there was no breach of duty, apparently on the ground that any harm to plaintiff was unforeseeable. He also granted summary judgment in favor of defendants on the issue of intentional infliction of emotional distress, finding that defendants' conduct did not rise to the required level of outrageousness. Finally, the judge granted summary judgment in favor of defendants on the issue of invasion of privacy, because he found that, viewing the facts in the light most **[***5]** favorable to plaintiff, the cause of action was not established.

II.

Our Supreme Court recently considered the proofs necessary to sustain a claim for negligent or intentional infliction of emotional distress in the absence of physical injury. In *Buckley v. Trenton Savings Fund Society*, 111 N.J. 355 (1988) the Court first considered "negligent infliction of emotional distress" and the development of case law thereunder, indicating that HN1 recovery seemed to be permitted, even in the absence of physical injury to the plaintiff, under circumstances where there was a "sufficient guarantee" **[**665]** of the "genuineness" of the claim and the emotional distress was sufficiently "severe," such as involving actual observation of severe injury or death to a loved one. 111 N.J. at 365. *See also Giardina v. Bennett*, 111 N.J. 412, 418-20 **[*255]** (1988); *Strachan v. John F. Kennedy Memorial Hospital*, 109 N.J. 523, 533-38 (1988). The *Buckley* Court then discussed "intentional infliction of emotional distress" and the developing case law thereunder, stating that "[g]enerally speaking, to establish **[***6]** a claim for intentional infliction of emotional

distress, the plaintiff must establish intentional and outrageous conduct by the defendant, proximate cause and distress that is severe." 111 N.J. at 366. *See also* Restatement, Second, Torts (1965), § 46 (*Restatement*). The Court determined that

> HN2[i]nitially, the plaintiff must prove that the defendant acted intentionally or recklessly. For an intentional act to result in liability, the defendant must intend both to do the act and to produce emotional distress. Liability will also attach when the defendant acts recklessly in deliberate disregard of a high degree of probability that emotional distress will follow. . . .
>
> Second, the defendant's conduct must be extreme and outrageous. . . . The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." . . . Third, the defendant's action must have been the proximate cause of the plaintiff's emotional distress . . . Fourth, the emotional distress suffered by the plaintiff must be "so severe that no reasonable man **[***7]** could be expected to endure it." [ 111 *N.J.* at 366. (citations omitted)].

With respect to both negligent and intentional infliction of emotional distress, therefore, the *Buckley* Court concluded that

> HN3[t]he severity of the emotional distress raises questions of both law and fact. Thus, the court decides whether as a matter of law such emotional distress can be found, and the jury decides whether it has in fact been proven. . . . When conduct is directed at a third party, proof of bodily harm is required, . . . but when the intentional conduct is directed at the plaintiff, he or she need not prove any physical injury. . . . It suffices that the conduct produce emotional distress that is severe. [ *Id.* at 367 (citations omitted)].

We conclude that the Law Division judge did not err in determining that there was insufficient evidence as a matter of law to present the emotional distress claims to a jury.

There was insufficient proof of severity of emotional distress, whether negligently or intentionally inflicted, to support a valid cause of action. *Cf.* Strachan, *supra*, 109 *N.J.* at 534. *See also* Giardina, *supra*, 111 *N.J.* at 419-420. **[***8]** Whether an insurance investigation following a claim may be deemed "one of the regrettable aggravations of living in today's society", Buckley, **[*256]** *supra*, 111 *N.J.* at 368 here the evidence was "insufficient as a matter of law to support a finding that the mental distress was so severe that no reasonable man could be expected to endure it," *ibid.*

III.

We are also satisfied that the facts, viewed in a manner most favorable to plaintiff, do not give rise to a cause of action for invasion of privacy.

> . . . HN4"The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied by the common name, but otherwise have almost nothing in common . . .":
> (i) commercial appropriation of one's name or likeness, (ii) intrusion, (iii) public disclosure of private facts and (iv) publicity which places the plaintiff in a false light in the public eye. [ *Galella v. Onassis*, 353 *F.Supp.* 196, 229, (S.D.N.Y.1972), *aff'd in part and rev'd in part* 487 *F.2d* 986 (2d Cir.1973), quoting from W. Prosser, Law of Torts para. 117 at 804-12 (4th ed. 1971).]

**[**666]** **[***9]** *See also* *Restatement, Second, Torts* (1977), § 652A; *Bisbee v. John C. Conover Agency*, 186 *N.J. Super.* 335, 339 (App.Div.1982).

This case concerns a claim for "unreasonable intrusion upon seclusion of another." *See Restatement*, § 652A. According to the *Restatement*,

> HN5[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person. [*Restatement*, § 652B.]

According to the comments to this section, a defendant is subject to liability

> . . . only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. . . . [There is no] liability for observing [the plaintiff] or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye.
>
> . . .
>
> There is likewise no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind **[***10]** that would be highly offensive to the ordinary reasonable man, as the result of conduct which the reasonable man would strongly object. [*Restatement, supra*, § 652B, comments c and d].

It may well be that "freedom from extensive shadowing and observation has come to be protected in most . . . jurisdictions", **[*257]** *Galella, supra*, 353 *F.Supp.* at 229, and that "overzealous" shadowing and monitoring may, therefore, be actionable, *id.* at 228. *See also Galella, supra*, 487 *F.2d* at 995-96. However, the facts of this case -- even accepting plaintiff's version as true in every respect -- do not warrant relief. *Cf. Bisbee, supra*, 186 *N.J. Super.* at 339-42. The allegations do not reveal an intrusion which would be "highly

offensive" to a reasonable person:

> HN6 The thrust of this aspect of the tort is, in other words, that a person's private, personal affairs should not be pried into. . . . The converse of this principle is, however, of course, that there is no wrong where defendant did not actually delve into plaintiff's concerns, or where plaintiff's activities are already public or known. **[***11]** [*Bisbee, id.* at 340 (citations omitted)].

*Bisbee* affirmed a grant of summary judgment in favor of defendant, denying plaintiff's claim that his seclusion was unreasonably intruded upon, because reasonable men could not find any highly offensive intrusion and because all the matters at issue were otherwise known and public. The photograph which was published in that case had been taken from the public thoroughfare and thus represented a view available to any bystander. *Ibid. See also N.O.C., Inc. v. Schaefer*, 197 *N.J. Super.* 249, 255 (Law Div.1984). Similarly, in *Forster v. Manchester*, 410 *Pa.* 192, 189 *A.*2d 147 (1963), the Pennsylvania Supreme Court held that detectives employed by an insurance company to make an investigation did not invade the privacy of a claimant since their surveillance "took place in the open or public thoroughfares where [the claimant]'s activities could be observed by passers-by." 189 *A.*2d at 150. The *Forster* court concluded that the conduct of the investigation was not "unreasonable," and therefore not actionable, adding that **[***12]** "by making a claim for personal injuries appellant must expect reasonable inquiry and investigation to be made of her claim and to this extent her interest in privacy is circumscribed." *Ibid.*

[illegible] defendants drove past her home, and were seen to do so, on several occasions on one day; that they parked their cars about half a mile from her home and **[*258]** stared at her as she drove past them; that they followed her on a public street to a store; and that after she parked in the store's parking lot, one defendant walked slowly around her car and stared her straight in the face. She also asserts that she was followed on Route 380 in Pennsylvania, and **[**667]** that when she stopped at a rest area the investigators did so as well. These allegations do not include acts which involve an unreasonable intrusion upon plaintiff's seclusion. Rather, the defendants' activities all took place in the open, either on public thoroughfares or in areas where members of the public had the right to be. As noted by Judge Haines in *Schaefer, supra*, "*Bisbee* supports the proposition that **[***13]** HN7 whatever the public may see from a public place cannot be private." 197 *N.J. Super.* at 255, n. 1.

An individual who seeks to recover damages for alleged injuries must expect that her claim will be investigated. Although the investigation must be reasonably conducted, and may not involve an intrusion into the privacy of the claimant which could be deemed highly offensive to a reasonable person, we conclude that here, even giving plaintiff the benefit of all legitimate inferences, the facts submitted in opposition to defendants' motion for summary judgment reveal no objectively unreasonable or highly offensive conduct on the part of the defendants. Accordingly, the judgment is affirmed.

* Signal Legend:
- Warning: Negative treatment is indicated
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- Positive treatment is indicated
- Citing Refs. With Analysis Available
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*25 N.Y.2d 560, *; 255 N.E.2d 765, **;*
*307 N.Y.S.2d 647, ***; 1970 N.Y. LEXIS 1618*

Ralph Nader, Respondent, v. General Motors Corporation, Appellant, et al., Defendants

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

25 N.Y.2d 560; 255 N.E.2d 765; 307 N.Y.S.2d 647; 1970 N.Y. LEXIS 1618

October 28, 1969, Argued January 8, 1970, Decided

**PRIOR HISTORY:**

*Nader v. General Motors Corp.*, 31 A D 2d 392.

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of said court, entered March 13, 1969, which affirmed an order of the Supreme Court at Special Term (Joseph A. Brust, J.; opinion 57 Misc 2d 301), entered in New York County, denying a motion by defendant to dismiss the first, second and fourth causes of action asserted in plaintiff's amended complaint on the ground that they failed to state a cause of action. The following question was certified: "Was the order of this Court entered on March 13, 1969, in so far as it affirmed the order of the court below denying a motion to dismiss the first and second causes of action, properly made?" The Appellate Division further certified that its determination was made as a matter of law and not in the

**DISPOSITION:** Order affirmed, etc.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Appeal from Appellate Division of the Supreme Court in the First Judicial Department (New York), which denied appellants' motion to dismiss respondent's claim for invasion of privacy.

**OVERVIEW:** Appellants sought review of appellate court's order denying appellants' motion to dismiss in respondent's action for invasion of privacy. Respondent alleged appellants engaged in harassing conduct with intent of preventing respondent from publishing his book, which criticized appellants' safety and design of automobiles. Court affirmed and determined that under law of District of Columbia, respondent had set out a claim for invasion of privacy. Court found District of Columbia intended to protect individuals from others who would unreasonably intrude into the personal affairs of others and disclose confidential information about the individual. There was no invasion of privacy claim set out where respondent alleged appellants asked friends of respondent personal information about respondent. Claim for invasion of privacy was set out where appellants wiretapped respondent's conversations.

**OUTCOME:** Court affirmed appellate court's decision, finding under District of Columbia law respondent sufficiently set out invasion of privacy claim where respondent alleged an unreasonable intrusion by appellants into confidential matters of respondent.

**CORE TERMS:** cause of action, invasion of privacy, privacy, causes of action, intrusion, actionable, invasion, surveillance, right to privacy, telephone, right of privacy, common-law,

intrusive, motion to dismiss, eavesdropping, wiretapping, threatening, harassing, aspersions, girls, confidential, public place, relevancy, gathering, accosted, illicit, casting, prying, sphere, common law

**LexisNexis (TM) HEADNOTES - Core Concepts -** ◆ Hide Concepts

Torts > Defamation & Invasion of Privacy > Intrusion

HN1 The mere gathering of information about a particular individual does not give rise to a cause of action under this theory. Privacy is invaded only if the information sought is of a confidential nature and the defendant's conduct was unreasonably intrusive. Just as a common-law copyright is lost when material is published, so, too, there can be no invasion of privacy where the information sought is open to public view or has been voluntarily revealed to others. In order to sustain a cause of action for invasion of privacy, therefore, the plaintiff must show that the appellant's conduct was truly intrusive and that it was designed to elicit information which would not be available through normal inquiry or observation. More Like This Headnote

Torts > Defamation & Invasion of Privacy > Intrusion

Torts > Intentional Torts > Intentional Infliction of Emotional Distress

HN2 Where severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation, a remedy is available in the form of an action for the intentional infliction of emotional distress. But the elements of such an action are decidedly different from those governing the tort of invasion of privacy. More Like This Headnote

Torts > Defamation & Invasion of Privacy > Intrusion

amount to an invasion of his privacy. More Like This Headnote

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Motions to Dismiss

HN4 It is settled that, so long as a pleading sets forth allegations which suffice to spell out a claim for relief, it is not subject to dismissal by reason of the inclusion therein of additional nonactionable allegations. More Like This Headnote

◆ Show Headnotes / Syllabus

**COUNSEL:** *Simon H. Rifkind, Martin Kleinbard* and *Allan Blumstein* for appellant. I. The common-law "right of privacy" claimed by plaintiff does not exist. ( *Peay* v. *Curtis Pub. Co.*, 78 F. Supp. 305; *Bernstein* v. *National Broadcasting Co.*, 129 F. Supp. 817, 232 F. 2d 369, 352 U.S. 945; *Afro-American Pub. Co.* v. *Jaffe*, 366 F. 2d 649; *Pearson* v. *Dodd*, 410 F. 2d 701; *Brandt* v. *Winchell*, 283 App. Div. 338; *Ruza* v. *Ruza*, 286 App. Div. 767.) II. The first and second causes of action do not plead a violation of plaintiff's "right of privacy". ( *Santiesteban* v. *Goodyear Tire & Rubber Co.*, 306 F. 2d 9; *Morrison* v. *National Broadcasting Co.*, 19 N Y 2d 453, 24 A D 2d 284; *Time, Inc.* v. *Hill*, 385 U.S. 374; *Goelet* v. *Confidential, Inc.*, 5 A D 2d 226; *Myer* v. *Myer*, 271 App. Div. 465, 296 N. Y. 979; *Tow* v. *Moore*, 24 A D 2d 648; *City of Watertown* v. *Town of Watertown*, 207 Misc. 433.) III. Traditional tort principles provide plaintiff with an adequate remedy. ( *Morrison* v. *National Broadcasting Co.*, 19 N Y 2d 453, 24 A D 2d 284; *Brandt* v. *Winchell*, 283 App. Div. 338; *Knapp Engraving Co.* v. *Keystone Photo Engraving Corp.*, 1 A D 2d 170; *Ametco, Ltd.* v. *Beltchev*, 5 A D 2d 631, 7 N Y 2d 783; *Harris Diamond Co.* v. *Army Times Pub. Co.*, 280 F. Supp. 273.)

*Alfred W. Gans, Stuart M. Speiser* and *Paul D. Rheingold* for respondent. I. The law of the District of Columbia is applicable to the first and second causes of action. II. Respondent's

first cause of action states a legally sufficient cause for invasion by intrusions of a specific right to privacy. ( Pearson v. Dodd, 410 F. 2d 701; Afro-American Pub. Co. v. Jaffe, 366 F. 2d 649; Peay v. Curtis Pub. Co., 78 F. Supp. 305.) III. Factual similarities of the first and second causes of action to the third provide no basis to dismiss the first two. ( Halio v. Lurie, 15 A D 2d 62.) IV. Denial of maintainability and enforceability in the New York courts, of his first and second causes of action, would deprive respondent of rights guaranteed from infringement by the Fifth, Fourteenth and Ninth Amendments to the Constitution of the United States. ( American Federation of Labor v. Swing, 312 U.S. 321; Bridges v. California, 314 U.S. 252; Schware v. Board of Bar Examiners, 353 U.S. 232; Kreshik v. St. Nicholas Cathedral, 363 U.S. 190; Railroad Trainmen v. Virginia Bar, 377 U.S. 1; Mine Workers v. Illinois State Bar. Assn., 389 U.S. 217; Levy v. Louisiana, 391 U.S. 68; Glona v. American Guar. Co., 391 U.S. 73; Millington v. Southeastern Elevator Co., 22 N Y 2d 498; Griswold v. Connecticut, 381 U.S. 479.)

**JUDGES:** Judges Scileppi, Bergan and Gibson concur with Chief Judge Fuld; Judge Breitel concurs in result in an opinion in which Judges Burke and Jasen concur.

**OPINIONBY:** FULD

**OPINION: [*563] [**767] [***649]** On this appeal, taken by permission of the Appellate Division on a certified question, we are called upon to determine the reach of the tort of invasion of privacy as it exists under the law of the District of Columbia.

The complaint, in this action by Ralph Nader, pleads four causes of action against the appellant, General Motors Corporation, and three other **[***650]** defendants allegedly acting as it agents. **[*564]** The first two causes of action charge an invasion of privacy, the third is predicated on the intentional infliction of severe emotional distress and the fourth on interference with the plaintiff's economic advantage. This appeal concerns only the legal

the appellant's motion to dismiss ( CPLR 3211, subd. [a], par. 7).

The plaintiff, an author and lecturer on automotive safety, has, for some years, been an articulate and severe critic of General Motors' products from the standpoint of safety and design. According to the complaint -- which, for present purposes, we must assume to be true -- the appellant, having learned of the imminent publication of the plaintiff's book "Unsafe at any Speed," decided to conduct a campaign of intimidation against him in order to "suppress plaintiff's criticism of and prevent his disclosure of information" about its products. To that end, the appellant authorized and directed the other defendants to engage in a series of activities which, the plaintiff claims in his first two causes of action, violated his right to privacy. n1

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n1 The first cause of action contains allegations of several types of activity which took place, for the most part, in the District of Columbia, while the second charges the appellant with engaging in similar activity in New York. It appears that, at least to some extent, both counts are premised on the same conduct and should be treated as stating alternative rather than cumulative claims for damages. In any event, however, the substantive nature of the two counts is the same.

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Specifically, the plaintiff alleges that the appellant's agents (1) conducted a series of interviews with acquaintances of the plaintiff, "questioning them about, and casting aspersions upon [his] political, social * * * racial and religious views * * *; his integrity; his

sexual proclivities and inclinations; and his personal habits" (Complaint, par. 9[b]); (2) kept him under surveillance in public places for an unreasonable length of time (par. 9 [c]); (3) caused him to be accosted by girls for the purpose of entrapping him into illicit relationships (par. 9[d]); (4) made threatening, harassing and obnoxious telephone calls to him (par. 9 [e]); (5) tapped his telephone and eavesdropped, by means of mechanical and electronic equipment, on his private conversations with others (par. 9[f]); and (6) conducted a "continuing" and harassing investigation of him **[*565]** (par. 9[g]). These charges are amplified in the plaintiff's bill of particulars, and those particulars are, of course, to be taken into account in considering the sufficiency of the challenged causes of action. (See *Bolivar v. Monnat*, 232 App. Div. 33, 34; see, also, 4 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 3211.43.)

The threshold choice of law question requires no extended discussion. In point of fact, the parties have agreed -- at least for purposes **[***651]** of this motion -- that the sufficiency of these allegations is to be determined under the law of the District of Columbia. The District is the jurisdiction in which most of the acts are alleged to have occurred, and it was there, too, that the plaintiff lived and suffered the impact **[**768]** of those acts. It is, in short, the place which has the most significant relationship with the subject matter of the tort charged. (See, e.g., *Babcock v. Jackson*, 12 N Y 2d 473.)

Turning, then, to the law of the District of Columbia, it appears that its courts have not only recognized a common-law action for invasion of privacy but have broadened the scope of that tort beyond its traditional limits. (See *Pearson v. Dodd*, 410 F. 2d 701; *Afro-American Pub. Co. v. Jaffe*, 366 F. 2d 649; *Peay v. Curtis Pub. Co.*, 78 F. Supp. 305; see, also, Bloustein, Privacy as an Aspect of Human Dignity, 39 N. Y. U. L. Rev. 962, 977; Prosser, Privacy, 48 Cal. L. Rev. 383, 389 *et seq.*) Thus, in the most recent of its cases on the subject, *Pearson v. Dodd* (410 F. 2d 701, *supra*), the Federal Court of Appeals for the District of Columbia declared (p. 704):

> "We approve the extension of the tort of invasion of privacy to instances of *intrusion*, whether by physical trespass or not, into spheres from which an ordinary man in a plaintiff's position could reasonably expect that the particular defendant should be excluded." (Italics supplied.)

It is this form of invasion of privacy -- initially termed "intrusion" by Dean Prosser in 1960 (Privacy, 48 Cal. L. Rev. 383, 389 *et seq.*; Torts, § 112) -- on which the two challenged causes of action are predicated.

Quite obviously, some intrusions into one's private sphere are inevitable concomitants of life in an industrial and densely **[*566]** populated society, which the law does not seek to proscribe even if it were possible to do so. "The law does not provide a remedy for every annoyance that occurs in everyday life." ( *Kelley v. Post Pub. Co.*, 327 Mass. 275, 278.) However, the District of Columbia courts have held that the law should and does protect against certain types of intrusive conduct, and we must, therefore, determine whether the plaintiff's allegations are actionable as violations of the right to privacy under the law of that jurisdiction. To do so, we must, in effect, predict what the judges of that jurisdiction's highest court would hold if this case were presented to them. (See, e.g., *Cooper v. American Airlines*, 149 F. 2d 355, 359, per Frank, J.) In other words, what would the Court of Appeals for the District of Columbia hold is the character of the "privacy" sought to be protected? More specifically, would that court accord an individual a right, as the plaintiff **[***652]** before us insists, to be protected against any interference whatsoever with his personal seclusion and solitude? Or would it adopt a more restrictive view of the right, as the appellant urges,

merely protecting the individual from intrusion into "something secret," from snooping and prying into his private affairs?

The classic article by Warren and Brandeis (The Right to Privacy, 4 Harv. L. Rev. 193) -- to which the court in the *Pearson* case referred as the source of the District's common-law action for invasion of privacy (410 F. 2d, at p. 703) -- was premised, to a large extent, on principles originally developed in the field of copyright law. The authors thus based their thesis on a right granted by the common law to "each individual * * * of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others" (4 Harv. L. Rev., at p. 198). Their principal concern appeared to be not with a broad "right to be let alone" (Cooley, Torts [2d ed.], p. 29) but, rather, with the right to protect oneself from having one's private affairs known to others and to keep secret or intimate facts about oneself from the prying eyes or ears of others.

In recognizing the existence of a common-law cause of action for invasion of privacy in the District of Columbia, the Court of Appeals has expressly adopted this latter formulation of the **[*567]** nature of the right. (See, e.g., *Afro-American Pub. Co.* **[**769]** v. *Jaffe*, 366 F. 2d 649, 653, *supra*.) Quoting from the Restatement, Torts (§ 867), the court in the *Jaffe* case (366 F. 2d at p. 653) has declared that "[liability] attaches to a person who 'unreasonably and seriously interferes with another's interest in *not having his affairs known to others*.'" (Emphasis supplied.) And, in *Pearson*, where the court extended the tort of invasion of privacy to instances of "intrusion," it again indicated, contrary to the plaintiff's submission, that the interest protected was one's right to keep knowledge about oneself from exposure to others, the right to prevent "*the obtaining of the information* by improperly intrusive means" (410 F. 2d, at p. 704; emphasis supplied). In other jurisdictions, too, the cases which have recognized a remedy for invasion of privacy founded upon intrusive conduct have generally involved the gathering of private facts or information through improper means. (See, e.g., *Hamberger* v. *Eastman*, 106 N. H. 107; *Ford Motor Co.* v. *Williams*, 108 Ga. App.

Aspect of Human Dignity, 39 N. Y. U. L. Rev. 962, 972. But cf. *Housh* v. *Peth*, 165 Ohio St. 35.)

It should be emphasized that [HN1]the mere gathering of information about a particular individual does not give rise to a cause of action **[***653]** under this theory. Privacy is invaded only if the information sought is of a confidential nature and the defendant's conduct was unreasonably intrusive. Just as a common-law copyright is lost when material is published, so, too, there can be no invasion of privacy where the information sought is open to public view or has been voluntarily revealed to others. (See *Forster* v. *Manchester*, 410 Pa. 192; *Tucker* v. *American Employers' Ins. Co.*, 171 So. 2d 437 [Fla.]; see, also, Prosser, Torts [3d ed.], p. 835; Restatement, 2d, Torts, Tent. Draft No. 13, § 652B, comment *c*.) In order to sustain a cause of action for invasion of privacy, therefore, the plaintiff must show that the appellant's conduct was truly "intrusive" and that it was designed to elicit information which would not be available through normal inquiry or observation.

The majority of the Appellate Division in the present case stated that *all of* "[*the*] *activities complained of*" in the first **[*568]** two counts constituted actionable invasions of privacy under the law of the District of Columbia (31 A D 2d, at p. 394). n2 We do not agree with that sweeping determination. At most, only two of the activities charged to the appellant are, in our view, actionable as invasions of privacy under the law of the District of Columbia (*infra*, pp. 568-571). However, since the first two counts include allegations which are sufficient to state a cause of action, we could -- as the concurring opinion notes (p. 571) -- merely affirm the order before us without further elaboration. To do so, though, would be a disservice both to the judge who will be called upon to try this case and to the litigants themselves. In other words, we deem it desirable, nay essential, that we go further and, for the guidance of the trial court and counsel, indicate the extent to which the plaintiff is entitled to rely on the various allegations in support of his privacy claim.

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n2 "The activities complained of:" wrote the Appellate Division majority, "the shadowing, the indiscriminate interviewing of third persons about features of his intimate life, the wiretapping and eavesdropping, the prying into his bank accounts, taxes, the alleged accosting by young women and the receipt of threatening phone calls, all are within the purview of these cases" (31 A D 2d, at p. 394).

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In following such a course, we are prompted not only by a desire to avoid any misconceptions that might stem from the opinion below but also by recognition of the fact that we are dealing with a new and developing area of the law. Indeed, **[**770]** we would fail to meet our responsibility if we were to withhold determination -- particularly since the parties have fully briefed and argued the points involved -- and thereby thrust upon the trial judge the initial burden of appraising the impact of a doctrine still in the process of growth and of predicting its reach in another jurisdiction.

**[***654]** Turning, then, to the particular acts charged in the complaint, we cannot find any basis for a claim of invasion of privacy, under District of Columbia law, in the allegations that the appellant, through its agents or employees, interviewed many persons who knew the plaintiff, asking questions about him and casting aspersions on his character. Although those inquiries may have uncovered information of a personal nature, it is difficult to see how they may be said to have invaded the plaintiff's privacy. **[*569]** Information about the plaintiff which was already known to others could hardly be regarded as private to the plaintiff.

he would necessarily assume the risk that a friend or acquaintance in whom he had confided might breach the confidence. If, as alleged, the questions tended to disparage the plaintiff's character, his remedy would seem to be by way of an action for defamation, not for breach of his right to privacy. (Cf. *Morrison v. National Broadcasting Co.*, 19 N Y 2d 453, 458-459.)

Nor can we find any actionable invasion of privacy in the allegations that the appellant caused the plaintiff to be accosted by girls with illicit proposals, or that it was responsible for the making of a large number of threatening and harassing telephone calls to the plaintiff's home at odd hours. Neither of these activities, howsoever offensive and disturbing, involved intrusion for the purpose of gathering information of a private and confidential nature.

As already indicated, it is manifestly neither practical nor desirable for the law to provide a remedy against any and all activity which an individual might find annoying. On the other hand, HN2↑where severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation, a remedy is available in the form of an action for the intentional infliction of emotional distress -- the theory underlying the plaintiff's third cause of action. But the elements of such an action are decidedly different from those governing the tort of invasion of privacy, and just as we have carefully guarded against the use of the prima facie tort doctrine to circumvent the limitations relating to other established tort remedies (see *Morrison v. National Broadcasting Co.*, 19 N Y 2d 453, 458-459, *supra*), we should be wary of any attempt to rely on the tort of invasion of privacy as a means of avoiding the more stringent pleading and proof requirements for an action for infliction of emotional distress. (See, e.g., *Clark v. Associated Retail Credit Men*, 105 F. 2d 62, 65 [Ct. App., D.C.].)

Apart, however, from the foregoing allegations which we find inadequate to spell out a cause of action for invasion of privacy under **[***655]** District of Columbia law, the complaint

contains allegations concerning other activities by the appellant or its agents **[*570]** which do satisfy the requirements for such a cause of action. The one which most clearly meets those requirements is the charge that the appellant and its codefendants engaged in unauthorized wiretapping and eavesdropping by mechanical and electronic means. The Court of Appeals in the *Pearson* case expressly recognized that such conduct constitutes a tortious intrusion (410 F. 2d 701, 704, *supra*), and other jurisdictions have reached a similar conclusion. (See, e.g., *Hamberger* v. *Eastman*, 106 N. H. 107, 112, *supra*; *Roach* v. *Harper*, 143 W. Va. 869, **[**771]** 877; *Fowler* v. *Southern Bell Tel. & Tel. Co.*, 343 F. 2d 150, 156.) n3 In point of fact, the appellant does not dispute this, acknowledging that, to the extent the two challenged counts charge it with wiretapping and eavesdropping, an actionable invasion of privacy has been stated.

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n3 Indeed, although the question whether wiretapping affords a predicate for an invasion of privacy action has not yet arisen in our own jurisdiction, we note that our Penal Law -- in an article entitled "Offenses Against the Right to Privacy" -- makes eavesdropping by such means a felony (Penal Law, art, 250, § 250.05).

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There are additional allegations that the appellant hired people to shadow the plaintiff and keep him under surveillance. In particular, he claims that, on one occasion, one of its agents followed him into a bank, getting sufficiently close to him to see the denomination of the bills he was withdrawing from his account. From what we have already said, HN3 it is manifest that the mere observation of the plaintiff in a public place does not amount to an invasion of

render it actionable. (See *Pearson* v. *Dodd*, 410 F. 2d 701, 704, *supra*; *Pinkerton Nat. Detective Agency* v. *Stevens*, 108 Ga. App. 159.) Whether or not the surveillance in the present case falls into this latter category will depend on the nature of the proof. A person does not automatically make public everything he does merely by being in a public place, and the mere fact that Nader was in a bank did not give anyone the right to try to discover the amount of money he was withdrawing. On the other hand, if the plaintiff acted in such a way as to reveal that fact to any casual observer, then, it may not be said that the appellant **[*571]** intruded into his private sphere. In any event, though, it is enough for present purposes to say that the surveillance allegation is not insufficient as a matter of law.

Since, then, the first two causes of action do contain allegations which are adequate to state a cause of action for invasion of privacy under District of Columbia law, the courts below properly denied the appellant's motion to dismiss those causes of action. HN4 It is settled **[***656]** that, so long as a pleading sets forth allegations which suffice to spell out a claim for relief, it is not subject to dismissal by reason of the inclusion therein of additional nonactionable allegations. (See *Spano* v. *Perini Corp.*, 25 N Y 2d 11, 18; see, also, *Tompkins* v. *State of New York*, 7 N Y 2d 906, 907; *Rager* v. *McCloskey*, 305 N. Y. 75, 80.)

We would but add that the allegations concerning the interviewing of third persons, the accosting by girls and the annoying and threatening telephone calls, though insufficient to support a cause of action for invasion of privacy, are pertinent to the plaintiff's third cause of action -- in which those allegations are reiterated -- charging the intentional infliction of emotional distress. However, as already noted, it will be necessary for the plaintiff to meet the additional requirements prescribed by the law of the District of Columbia for the maintenance of a cause of action under that theory.

The order appealed from should be affirmed, with costs, and the question certified answered

in the affirmative.

**CONCURBY:** BREITEL

**CONCUR:** Breitel, J. (concurring in result). There is no doubt that the first and second causes of action are sufficient in alleging an invasion of privacy under what appears to be the applicable law in the District of Columbia ( *Pearson* v. *Dodd*, 410 F. 2d 701, 704; *Afro-American Pub. Co.* v. *Jaffe*, 366 F. 2d 649, 653-654). This should be the end of this court's proper concern with the pleadings, the only matter before the court being a motion to **[**772]** dismiss specified causes of action for insufficiency.

Thus it is not proper, it is submitted, for the court directly or indirectly to analyze particular allegations in the pleadings, once the causes of action are found sufficient, in order to determine whether they would alternatively sustain one cause of action **[*572]** or another, or whether evidence offered in support of the allegations is relevant only as to one rather than to another cause of action. Particularly, it is inappropriate to decide that several of the allegations as they now appear are referable only to the more restricted tort of intentional infliction of mental distress rather than to the common-law right of privacy upon which the first and second causes of action depend. The third cause of action is quite restricted. Thus many of the quite offensive acts charged will not be actionable unless plaintiff succeeds in the very difficult, if not impossible, task of showing that defendants' activities were designed, actually or virtually, to make plaintiff unhappy and not to uncover disgraceful information about him. The real issue in the volatile and developing **[***657]** law of privacy is whether a private person is entitled to be free of certain grave offensive intrusions unsupported by palpable social or economic excuse or justification.

True, scholars, in trying to define the elusive concept of the right of privacy, have, as of the present, subdivided the common law right into separate classifications, most significantly

Torts, Tent. Draft No. 13 [April 27, 1967], §§ 652A, 652B, 652D; Prosser, Torts [3d ed.], pp. 832-837). This does not mean, however, that the classifications are either frozen or exhausted, or that several of the classifications may not overlap.

Concretely applied to this case, it is suggested, for example, that it is premature to hold that the attempted entrapment of plaintiff in a public place by seemingly promiscuous ladies is no invasion of any of the categories of the right to privacy and is restricted to a much more limited cause of action for intentional infliction of mental distress. Moreover, it does not strain credulity or imagination to conceive of the systematic "public" surveillance of another as being the implementation of a plan to intrude on the privacy of another. Although acts performed in "public", especially if taken singly or in small numbers, may not be confidential, at least arguably a right to privacy may nevertheless be invaded through extensive or exhaustive monitoring and cataloguing of acts normally disconnected and anonymous.

**[*573]** These are but illustrations of the problems raised in attempting to determine issues of relevancy and allocability of evidence in advance of a trial record. The other allegations so treated involve harassing telephone calls, and investigatory interviews. It is just as important that while allegations treated singly may not constitute a cause of action, they may do so in combination, or serve to enhance other violations of the right to privacy.

It is not unimportant that plaintiff contends that a giant corporation had allegedly sought by surreptitious and unusual methods to silence an unusually effective critic. If there was such a plan, and only a trial would show that, it is unduly restrictive of the future trial to allocate the evidence beforehand based only on a pleader's specification of overt acts on the bold assumption that they are not connected causally or do not bear on intent and motive.

It should be observed, too, that the right to privacy, even as thus far developed, does not always refer to that which is not known to the public or is confidential. Indeed, the statutory

right of privacy in this State and perhaps the most traditional right of privacy in the "common law sense" relates to the commercialized publicity of one's face or name, perhaps the two most public aspects of an individual (see Civil Rights **[***658]** Law, §§ 50, 51; Restatement, **[**773]** 2d, Torts, Tent. Draft No. 13 [April 27, 1967], § 652C).

There is still further difficulty. In this State thus far there has been no recognition of a common-law right of privacy, but only that which derives from a statute of rather limited scope (Civil Rights Law, §§ 50, 51; *Flores* v. *Mosler Safe Co.*, 7 N Y 2d 276, 280; *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 556-557). Consequently, this court must undertake the hazardous task of applying what is at present the quite different law of the District of Columbia. True, this may be the court's burden eventually, if the case were to return to it for review after trial, especially if the plaintiff were to prevail upon such a trial. However, there is no occasion to advance, now, into a complicated, subtle and still-changing field of law of another jurisdiction, solely to determine before trial the relevancy and allocability among pleaded causes of action or projected but not yet offered items of evidence. It is not overstatement to say that **[*574]** in the District of Columbia the law of the right of privacy is still inchoate in its development, perhaps more so than in many other jurisdictions that accept this newly coined common-law cause of action, despite unequivocal acceptance as a doctrine and extension by dictum to cases of intrusion ( *Pearson* v. *Dodd, supra*, at p. 704). * In the absence of a trial record, the court should avoid any unnecessary extrapolation of what the District of Columbia Court of Appeals has characterized as "an untried and developing area of tort law" ( *Pearson* v. *Dodd, supra*, p. 705).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* This is what the latest pronouncement from the Court of Appeals in the District Columbia has to say about this "new" tort, as applied to intrusion: "Unlike other types of invasion of

information obtained. The tort is completed with the obtaining of the information by improperly intrusive means.

"'Intrusion' has not been either recognized or rejected as a tort in the District of Columbia. It has been recognized by a number of state courts, most recently by the New Hampshire Supreme Court in *Hamberger* v. *Eastman* [106 N. H. 107]. *Hamberger* found liable a defendant who eavesdropped upon the marital bedroom of plaintiffs by electronic means, holding that 'the invasion of the plaintiffs' solitude or seclusion * * * was a violation of their right of privacy.'

"We approve the extension of the tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in a plaintiff's position could reasonably expect that the particular defendant should be excluded. Just as the Fourth Amendment has expanded to protect citizens from government intrusions where intrusion is not reasonably expected, so should tort law protect citizens from other citizens. The protection should not turn exclusively on the question of whether the intrusion involves a technical trespass under the law of property. The common law, like the Fourth Amendment, should 'protect people, not places.'" (footnotes omitted).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

Nor does *Rager* v. *McCloskey* (305 N. Y. 75) offer support for the excursion in this case into the allocation in advance of trial and an evidentiary record of the functional relevancy of evidence **[***659]** perhaps to be offered in the future and perhaps not. In the *Rager* case, plaintiff had urged throughout the proceedings an alternative, independent, and unsustainable legal theory based allegedly on the accordion doctrine of "prima facie" tort (see *Morrison* v. *National Broadcasting Co.*, 24 A D 2d 284, 289-292, revd. on narrow grounds, 19

N Y 2d 453). Quite appropriately, although perhaps not necessarily, the court in sustaining the complaint pointed out that the cause of action could not survive on the alternative theory in the absence of allegation and proof of special damages. This was accomplished by a simple reference to the theory of "prima facie" tort and the patent vital omission of an allegation of special damages in the pleading. **[**774]** Notably, and so relevant to the policy to be followed in this case, the court otherwise limited its analysis of the pleading. Having found that the *Rager* complaint stated a cause of action against each of the defendants, the court declined to consider whether allegations of additional false statements, and recitals **[*575]** of conspiracy, were still relevant or admissible on any further cause of action. It stated: "Since, then, the complaint does state a cause of action against each of the defendants, it is immune from attack for insufficiency, even though it may contain additional allegations that are inadequate to charge any further cause of action. (See *Abrams* v. *Allen*, 297 N. Y. 52, 54; *Advance Music Corp.* v. *American Tobacco Co.*, 296 N. Y. 79, 84; *Abbey* v. *Wheeler*, 170 N. Y. 122, 127.) Accordingly, we postpone for possible future consideration the question whether other allegedly false statements -- attributed to one or another of defendants -- may be ruled defamatory and slanderous per se, as well as the further question whether the recitals of conspiracy are sufficient to charge each of the defendants with liability for the acts of the others." ( *Rager* v. *McCloskey, supra*, at p. 80.)

The plaintiff, naturally enough, is trying to broaden his warrant, and defendant-appellant is correspondingly trying to narrow that warrant. But the eagerness of the parties in briefing hypothetical problems does not require an advisory opinion or a declaratory judgment by the highest court of the State without the benefit of a trial judge's rulings on relevancy, and an Appellate Division's review of those rulings on a trial record. There is no justification, on the present record, for giving an illiberal and restrictive scope to a cause of action based on the right of privacy as that right is likely to be defined under the applicable law of another jurisdiction.

done so often, by declaring **[*576]** that they are not necessarily **[***660]** adopted in concluding that a cause or causes of action have been stated.

Accordingly, because of the prematurity of ruling on any other question but the sufficiency of the causes of action, I concur in result only.

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Citation: **780 so2d 685**

*780 So. 2d 685, *; 2000 Ala. LEXIS 250, ***

I.C.U. Investigations, Inc. v. Charles R. Jones

1981714

SUPREME COURT OF ALABAMA

780 So. 2d 685; 2000 Ala. LEXIS 250

June 30, 2000, Released

**SUBSEQUENT HISTORY: [**1]** As Corrected August 21, 2000. Application for Rehearing Overruled September 1, 2000, Reported at: 2000 Ala. LEXIS 377. Released for Publication January 30, 2001.

**PRIOR HISTORY:** Appeal from Clay Circuit Court. (CV-98-026). TRIAL JUDGE: John E. Rochester.

**DISPOSITION:** REVERSED AND JUDGMENT RENDERED.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Appellant investigation firm challenged the judgment of the Clay Circuit Court (Alabama) entered in favor of appellee employee in his invasion of

court erred in denying its motion for a judgment as a matter of law.

**OVERVIEW:** Appellee's employer hired appellant in preparation for a workers' compensation trial to watch appellee's daily activities to determine the extent of his work-related injury and subsequent disability. Appellee sued appellant for invasion of privacy, and the trial court found in his favor. The court reversed. The court determined that the purpose of the investigation was legitimate because the key issue in appellee's workers' compensation case was the extent of his injury, and appellee should therefore have expected a reasonable investigation regarding his physical capacity. The investigation was not offensive or objectionable because appellant watched and taped appellee's activities while he was outside his home exposed to public view, which could have been observed by any passerby. Appellant never entered or taped activities conducted in appellee's home. Therefore, the trial court erred in denying appellant's motion for judgment as a matter of law.

**OUTCOME:** Judgment reversed because the purpose of appellant's investigation of appellee was legitimate and the investigation itself was not offensive or objectionable.

**CORE TERMS:** intrusion, front yard, privacy, seclusion, invasion of privacy, invasion-of-privacy, solitude, workers' compensation, urinating, invaded, offensive, commercial use, highway, investigator, means used, surveillance, filmed, gaze, videotaped, videotape, presumption of correctness, substantial evidence, jury verdict, favorable, matter of law, public place, public eye, appropriation, personality, actionable

**LexisNexis (TM) HEADNOTES - Core Concepts** - ◆ Hide Concepts

Civil Procedure > Trials > Judgment as Matter of Law

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 In regard to review of a motion for a judgment as a matter of law (JML) and a renewed motion for a JML, an appellate court uses the same standard the trial court used initially in granting or denying a JML. Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case or the issue to be submitted to the jury for a factual resolution. For actions filed after June 11, 1987, the nonmovant must present "substantial evidence" in order to withstand a motion for a JML. Ala. Code § 12-21-12 (1975). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. More Like This Headnote

Civil Procedure > Trials > Judgment as Matter of Law

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2 In reviewing a ruling on a motion for a judgment as a matter of law, an appellate court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Regarding a question of law, however, the appellate court indulges no presumption of correctness as to the trial court's ruling. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN3 A jury verdict is presumed to be correct, and that presumption is strengthened by the trial court's denial of a motion for a new trial. In reviewing a jury verdict, an appellate court must consider the evidence in the light most favorable to the prevailing party, and it will set aside the verdict only if it is plainly and palpably wrong. More Like This Headnote

Torts > Defamation & Invasion of Privacy

HN4 The wrongful intrusion into one's private activities constitutes a tort known as the invasion of privacy. The "four distinct wrongs" of the tort of invasion of privacy are as follows: (1) the intrusion upon the plaintiff's physical solitude or seclusion; (2) publicity which violates the ordinary decencies; (3) putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; and (4) the appropriation of some element of the plaintiff's personality for a commercial use. More Like This Headnote

Torts > Defamation & Invasion of Privacy > Intrusion

Torts > Defamation & Invasion of Privacy > Public Disclosure of Private Facts

HN5 The tort of invasion of privacy may occur both where there is a public and commercial use or publication and where there is a wrongful intrusion into one's private activities or solitude or seclusion. More Like This Headnote

Torts > Defamation & Invasion of Privacy > Appropriation & Right of Publicity

Torts > Defamation & Invasion of Privacy > Intrusion

Torts > Defamation & Invasion of Privacy > Public Disclosure of Private Facts

HN6 There are two standards a court uses to find whether there has been a tort of invasion of privacy: (1) If there has not been public or commercial use or publication, then the proper standard is whether there has been an intrusion upon the plaintiff's physical solitude or seclusion, or a wrongful intrusion into one's private activities in such manner so as to outrage or to cause mental suffering, shame or humiliation to a person of ordinary sensibilities; and (2) if there has been public or commercial use or publication of private information, then the proper standard is whether there has been unwarranted publicity, unwarranted appropriation or exploitation of one's personality, publication of private affairs not within the legitimate concern of the public, an intrusion into one's physical solitude

or seclusion, the placing of one in a false but not necessarily defamatory position in the public eye, or an appropriation of some element of one's personality for commercial use. More Like This Headnote

Torts > Defamation & Invasion of Privacy > Statutory Privileges

HN7 Plaintiffs making personal-injury claims must expect reasonable inquiry and investigation to be made of their claims and that to this extent their interest in privacy is circumscribed. More Like This Headnote

**COUNSEL:** For Appellant: Jack R. Thompson, Jr., of Kracke, Thompson & Ellis, P.C., Birmingham.

For Appellee: Lister H. Proctor and J. Bradley Proctor of Proctor & Vaughn, Sylacauga.

**JUDGES:** BROWN, Justice. Hooper, C.J., and Maddox, Houston, See, and Lyons, JJ., concur. Cook, Johnstone, and England, JJ., dissent.

**OPINIONBY:** BROWN

**OPINION: [*687]**

BROWN, Justice.

A jury found in favor of Charles R. Jones on his invasion-of-privacy claim, awarding him $ 100,000 against the defendant I.C.U. Investigations, Inc. ("ICU"). ICU appeals, arguing that the court erred in denying its motion for a judgment as a matter of law on that claim.

driver. While working on February 26, 1990, he suffered an electric shock and fell from the bed of the truck, dislocating and fracturing his left shoulder. Following his injury, he underwent five operations for problems with his shoulder, neck, back, and ribs. Jones sued APCo for workers' compensation benefits; APCo disputed the extent of his disability.

In preparation for the workers' compensation trial, APCo hired ICU, an investigation firm, to watch Jones's daily activities. ICU **[**2]** was owned and operated by Kevin Hand. Hand and another investigator for ICU, Johnson Brown, went to Clay County to monitor Jones's activities. ICU investigated Jones for 11 or 12 days during February and March 1998. n1 Jones lived in a mobile home at the intersection of Highway 77 and County Road 79; the front of his residence faced County Road 79. Jones testified that his mobile home was approximately 200 yards from Highway 77 and a "lot closer" to County Road 79. The front yard was visible from both Highway 77 and County Road 79. When watching Jones at his home, Hand would videotape from a motor vehicle parked on the shoulder of Highway 77 or County Road 79. n2

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n1 Hand's investigation log indicated 11 days of surveillance, but Hand testified at trial that he investigated Jones for 12 days.

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n2 Jones testified at trial that he had seen a blue van parked at his neighbor's barn located

off Highway 77; however, Jones said he did not know whether Hand was in the van.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**3]**

Neither Hand nor Brown entered onto Jones's property. When Hand or Brown recorded Jones's activities in the nearby town of Wadley, they filmed from a vehicle parked on a public street or in a parking lot.

On at least four occasions, Hand taped Jones urinating in his front yard. Hand testified that when he videotaped Jones's activities, he often watched with his naked eye; thus, he said only once had he suspected that Jones was urinating. At the end of each day's surveillance or soon **[*688]** thereafter, Hand copied the tapes and sent the copies to APCo's attorney.

When Jones learned that Hand had videotaped him urinating in his yard, Jones filed another lawsuit against APCo, adding as defendants ICU and Hand. He alleged that APCo and ICU had been negligent or wanton in hiring and supervising their employees, and he alleged that all three defendants had invaded his privacy. APCo, ICU, and Hand each moved for a summary judgment. The court granted APCo's motion, but denied ICU and Hand's motions. Jones later dismissed Hand.

After Jones rested his case, ICU moved for a judgment as a matter of law ("JML") on the invasion-of-privacy claim. The trial court denied the motion. I. **[**4]** C.U. renewed its motion for a JML at the close of all the evidence. The motion was again denied. At the close of all the evidence, the judge, the jury, and the attorneys for each side visited Jones's property to view the location of the videotaping; they then returned to the courtroom for closing arguments and the trial judge's oral charge. The trial court submitted only the invasion-of-privacy claim to the jury. The jury returned a verdict in favor of Jones on the invasion-of-privacy claim, awarding him $ 75,000 in compensatory damages and $ 250,000 in punitive damages. On March 3, 1999, ICU filed a renewed motion for a JML, or, in the alternative, for a new trial or an order requiring a remittitur. The trial court did not rule on the motion, and the motion was denied by operation of law, Rule 59.1, Ala. R. Civ. P.

ICU argues that the court erred in denying its motion for a JML on Jones's invasion-of-privacy claim. We have stated, HN1 in regard to review of a motion for a JML and a renewed motion for a JML:

"This Court uses the same standard the trial court used initially in granting or denying a JML. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). **[**5]** Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case or the issue to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). For actions filed after June 11, 1987, the nonmovant must present 'substantial evidence' in order to withstand a motion for a JML. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. HN2 In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Motion Industries, Inc. v. Pate, 678 So. 2d 724 (Ala. 1996). Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court's ruling. Ricwil, Inc. v. S.L. Pappas & Co., 599 So. 2d 1126 (Ala. 1992). **[**6]**

"Furthermore, HN3 a jury verdict is presumed to be correct, and that presumption is strengthened by the trial court's denial of a motion for a new trial. Cobb v. MacMillan Bloedel, Inc., 604 So. 2d 344 (Ala. 1992). In reviewing a jury verdict, an appellate court must

consider the evidence in the light most favorable to the prevailing party, and it will set aside the verdict only if it is plainly and palpably wrong. Id."

Delchamps, Inc. v. Bryant, 738 So. 2d 824, 830-31 (Ala. 1999).

In Johnson v. Corporate Special Services, Inc., 602 So. 2d 385 (Ala. 1992), this Court addressed the law applicable to invasion-of-privacy claims:

"This Court recognizes that HN4 the wrongful intrusion into one's private activities constitutes a tort known as the invasion of privacy. Alabama Electric **[*689]** Co-Operative, Inc. v. Partridge, 284 Ala. 442, 445, 225 So. 2d 848, 851 (1969). This Court in Norris v. Moskin Stores, Inc., 272 Ala. 174, 132 So. 2d 321 (1961), following W. Prosser, Law of Torts, pp. 637-39 (2d ed. 1955), set out the 'four distinct wrongs' of the tort of invasion of privacy:

"'1) the **[**7]** intrusion upon the plaintiff's physical solitude or seclusion; 2) publicity which violates the ordinary decencies; 3) putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; and 4) the appropriation of some element of the plaintiff's personality for a commercial use.'

"See Hogin v. Cottingham, 533 So. 2d 525, 528 (Ala. 1988).

HN5

"The tort of invasion of privacy may occur both where there is a public and commercial use or publication and where there is a wrongful intrusion into one's private activities or solitude or seclusion. Hogin, 533 So. 2d at 530, citing Norris, 272 Ala. at 176, 132 So. 2d at 322-23. HN6 There are two standards the Court uses to find whether there has been a tort of invasion of privacy:

"'1) If there has not been public or commercial use or publication, then the proper standard is

"wrongful intrusion into one's private activities in such manner so as to outrage or to cause mental suffering, shame or humiliation to a person of ordinary sensibilities"; and 2) if there has **[**8]** been public or commercial use or publication of private information, then the proper standard is whether there has been "unwarranted publicity," "unwarranted appropriation or exploitation of one's personality," publication of private affairs not within the legitimate concern of the public, an intrusion into one's "physical solitude or seclusion," the placing of one in a "false but not necessarily defamatory position in the public eye," or an "appropriation of some element of [one's] personality for commercial use."'

" Hogin, 533 So. 2d at 530-31 (citations omitted). (Emphasis added.) See also, Smith v. Doss, 251 Ala. 250, 37 So. 2d 118 (1948)."

602 So. 2d at 387.

Like Johnson, this case requires that we first determine the purpose for the investigation and whether "'the thing into which there is intrusion or prying [is], and [is] entitled to be, private.'" Hogin, 533 So. 2d at 531 (quoting W. Prosser & W. Keeton, The Law of Torts 855 (5th ed. 1984)). In Alabama Electric Co-operative, Inc. v. Partridge, 284 Ala. 442, 445, 225 So. 2d 848, 851 (1969), this Court noted, with approval, **[**9]** that HN7 plaintiffs making personal-injury claims "'must expect reasonable inquiry and investigation to be made of [their] claims and [that] to this extent [their] interest in privacy is circumscribed.'"

The key issue in Jones's workers' compensation case was the extent of his injury. Jones, therefore, should have expected a reasonable investigation regarding his physical capacity. In fact, Jones testified that he was aware that APCo might investigate the validity of his workers' compensation claim and that the investigation might involve surveillance. We conclude that the purpose for the investigation was legitimate; thus, we must consider whether the means

used in the investigation was offensive or objectionable. Johnson, 602 So. 2d at 387.

Hand watched Jones and taped his activities while Jones was outside his home, in his front yard, where he was exposed to public view. Indeed, Jones's front yard was located at the intersection of two public roads. At no time did Hand enter or tape activities conducted inside Jones's own home. Because the activities Jones carried on in his front yard could have been observed by any passerby, we conclude **[*690]** that any intrusion **[**10]** by ICU into Jones's privacy was not "wrongful" and, therefore, was not actionable.

The trial court should have granted ICU's motion for a JML on Jones's invasion-of-privacy claim. The judgment is reversed and a judgment is rendered for the defendant ICU.

REVERSED AND JUDGMENT RENDERED.

Hooper, C.J., and Maddox, Houston, See, and Lyons, JJ., concur.

Cook, Johnstone, and England, JJ., dissent.

**DISSENTBY:** COOK; ENGLAND

**DISSENT:**

COOK, Justice (dissenting).

I respectfully dissent from the majority's holding that the intrusion by I.C.U. Investigations, Inc. ("ICU"), into Jones's privacy was not "wrongful" and, therefore, not actionable. Jones lives in a mobile home on 41 acres of land, his only neighbor living 250 yards away. ICU's employee, Hand, was told to videotape Jones doing activities, with the tape to be used as evidence against Jones at his workers' compensation trial. However, Hand videotaped Jones urinating in his front yard and submitted the tape to the lawyer for Alabama Power Company, Jones's employer. Clearly, a videotape of Jones urinating in his yard served no legitimate purpose in Jones's workers' compensation case. Although Jones was in his front yard, **[**11]** the matter was clearly personal in nature.

Although the evidence was undisputed that Jones was urinating in his front yard, I conclude that, given the distance from the highway, and the layout of his property, a disputed issue existed as to whether Jones's activities were public. In addition, a factual issue existed as to whether the means used to videotape Jones was improper, offensive, and unreasonable. The trial court and the jury reviewed the videotapes and went to the scene where the video was filmed. The trial court and the jury inspected the property and the area where Hand testified that he was positioned when he filmed the video. The jury could have determined that Hand was in fact not on public property when he videotaped Jones conducting an act that Jones intended to be private. Because a factual question existed as to whether the means used was unreasonable, offensive, or improper, the trial court properly submitted the claim to the jury. Apparently, after viewing the scene, the jury found the means used by ICU to be unreasonable, objectionable, and offensive. Therefore, I would affirm the judgment based on the jury verdict in favor of Jones and against ICU.

Johnstone, **[**12]** J., concurs.

ENGLAND, Justice (dissenting).

The question before us is: Considering the evidence in a light most favorable to Jones, did Jones produce substantial evidence creating a factual dispute requiring resolution by the jury? I believe he did. Therefore, I respectfully dissent from the majority's decision to reverse the judgment for Jones and render a judgment for I.C.U. Investigations, Inc. ("ICU").

ICU argues that if the trial court had followed this Court's decision in Johnson v. Corporate Special Services, Inc., 602 So. 2d 385 (Ala. 1992), it would have concluded that ICU did not invade Mr. Jones's privacy. Specifically, ICU contends that if Johnson is controlling, then the trial court erred by failing to grant ICU's motion for a judgment as a matter of law.

ICU contends that because it filmed Jones while Jones was in his front yard and was aware that he might be under surveillance by Alabama Power Company, his privacy was not invaded. In Johnson, an employee who had filed a workers' compensation claim was under surveillance by a company hired by his employer's workers' compensation carrier. 602 So. 2d at 386. When **[**13]** the employee confronted the investigator, the investigator allegedly revealed a gun and drove **[*691]** away from the surveillance scene. The employee sued the insurance carrier and the investigation company, alleging assault and battery and invasion of privacy. The trial court entered a summary judgment in favor of the insurance carrier and the investigation company on the invasion-of-privacy claim. This Court affirmed. Quoting Hogin v. Cottingham, 533 So. 2d 525, 530-31 (Ala. 1998), we stated that this Court had applied two standards for determining if a wrongful intrusion has occurred. The first of those standards reads as follows:

"If there has not been public or commercial use or publication, then the proper standard is whether there has been an 'intrusion upon the plaintiff's physical solitude or seclusion,' or a 'wrongful intrusion into one's private activities in such manner so as to outrage or to cause mental suffering, shame or humiliation to a person of ordinary sensibilities' ...."

Johnson, 602 So. 2d at 387.

We stated in Johnson that in determining whether an intrusion upon seclusion is actionable, the court must examine both **[**14]** the purpose for the intrusion and the means used. Johnson, 602 So. 2d at 387. Because in Johnson the extent of the employee's injury was in dispute, the employee should have "expected a reasonable amount of [illegible]" and, thus, this Court determined that the investigative purpose was legitimate. In examining the means used, this Court cited, with approval, Alabama Electric Co-Operative, Inc. v. Partridge, 284 Ala. 442, 225 So. 2d 848, 851 (1969), which had stated that a plaintiff claiming personal injury subjects himself to public observation and is "'not entitled to the same degree of privacy that he or she would enjoy within the confines of [his or] her home.'" Johnson, 602 So. 2d at 388 (quoting Partridge, 284 Ala. at 445, 225 So. 2d at 851). In conclusion, this Court said:

"[The investigator] observed [the employee] while [the employee] was outside his home, in his front yard, where he was exposed to the public. At no time did [the investigator] intrude upon [the employee's] privacy inside [the employee's] own home. This Court finds that **[**15]** because [the employee's] activities in his front yard could have been observed by any passerby, [the investigation company's] intrusion into [the employee's] privacy was not 'wrongful' and, therefore, was not actionable."

602 So. 2d at 388

The holding in Johnson indicates that activity in a person's front yard, when that person is exposed to the public view, is not subject to protection for privacy reasons. By contrast, filming activity inside the home or even in the backyard can be an invasion of privacy. Although ICU filmed Jones urinating in his front yard, n3 Jones's act of urinating was a private act, one not usually exposed to the public gaze.

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n3 The record indicates that Jones's front porch and front yard could be seen by persons traveling on Highway 77 or on County Road 79.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -Since this Court decided Smith v. Doss, 251 Ala. 250, 37 So. 2d 118 (1948), Alabama has recognized the invasion-of-privacy tort:

"It is generally accepted that the invasion **[**16]** of privacy tort consists of four distinct wrongs: 1) the intrusion upon the plaintiff's physical solitude or seclusion; 2) publicity which violates the ordinary decencies; 3) putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; and 4) the appropriation of some element of the plaintiff's personality for a commercial use. Norris v. Moskin Stores, Inc., 272 Ala. 174, 132 So. 2d 321 (1961), citing W. Prosser, Law of Torts, pp. 637-39 (2d ed. 1955)."

Phillips v. Smalley Maintenance Servs., Inc., 435 So. 2d 705, 708 (Ala. 1983). In Phillips, this Court adopted the Restatement (Second) of Torts § 652B (1977) definition of invasion of privacy or intrusion into the plaintiff's solitude or seclusion. **[*692]** 435 So. 2d at 708; Johnston v. Fuller, 706 So. 2d 700, 702 (Ala. 1997). Restatement § 652B states:

"One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person. **[**17]** "

Comments a and b to § 652B state:

"a. The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.

"b. The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs widow with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The **[**18]** intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined."

Thus, as we held in Johnson, an investigator filming, photographing, or looking into a person's home through the windows invades that person's privacy.

In the instant case, Kevin Hand testified that he did not film Jones inside his home, but in the front yard. Comments c and d to Restatement § 652B state:

"c. The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. Thus there is no liability for the examination of a public record concerning the plaintiff, or of documents that the plaintiff is required to keep and make available for public inspection. Nor is there liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye. Even in a public place,

however, there may be some matters about the plaintiff, **[**19]** such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters.

"[Illustrations omitted.]

"d. There is likewise no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object."

(Emphasis supplied.) Therefore, under certain circumstances, a person's privacy may be invaded even when he is in a public place. Illustration 7 to Restatement § 652B provides an example of the public-place/private-matter exception.

"A, a young woman, attends a 'Fun House,' a public place of amusement where various tricks are played upon visitors. While she is there a concealed jet of compressed air blows her skirts over her head, and reveals her underwear. B takes a photograph of her in that position. B has invaded A's privacy."

**[*693]**

Since the front yard, which is subject to the public gaze, is a public place for invasion-of-privacy purposes, the investigator was free to film Jones while he was in his front **[**20]** yard. However, despite the fact that Jones urinated in the front yard, ICU, through Hand, invaded Jones's privacy, because he filmed an act "not exhibited to the public gaze."

In light of the presumption of correctness attributed to jury verdicts, and our duty to consider the evidence on appeal in the light most favorable to Jones, see Delchamps, Inc. v. Bryant, 738 So. 2d 824, 830-31 (Ala. 1999), I cannot say that the verdict was "plainly and palpably wrong." This presumption of correctness should be further enhanced because the jury viewed

front yard Jones was when he urinated and whether there were places in his front yard where he could stand and not be in public view or subject to the public gaze. Thus, by viewing the premises, the jury was in a better position to judge whether ICU had extended into areas "not exhibited to the public gaze." These are the kinds of circumstances where a personal view of the premises by the jury should enhance the presumption of correctness that attaches to a jury verdict. We have held that a trial court's findings are enhanced under the **[**21]** ore tenus rule when the trial court personally views the property in question. See Bell v. Jackson, 530 So. 2d 42 (Ala. 1988).

Jones presented substantial evidence indicating that ICU invaded Jones's privacy, and the evidence presented a factual dispute requiring resolution by the jury. Thus, the trial court correctly denied ICU's motion for a judgment as a matter of law or for a new trial or an order of remittitur. I would affirm the judgment of the trial court.

*191 Misc. 2d 541, *; 742 N.Y.S.2d 767, **;*
*2002 N.Y. Misc. LEXIS 391, ****

The People of the State of New York, Respondent, v. Paul Stuart, Appellant.

NY County Clerk's # 571011-00

SUPREME COURT OF NEW YORK, APPELLATE TERM, FIRST DEPARTMENT

191 Misc. 2d 541; 742 N.Y.S.2d 767; 2002 N.Y. Misc. LEXIS 391

April 30, 2002, Decided

**SUBSEQUENT HISTORY: [***1]** As Corrected May 21, 2002. Counsel and Opinion Corrected June 4, 2002. Appeal granted by People v. Stuart, 98 N.Y.2d 772, 781 N.E.2d 925, 2002 N.Y. LEXIS 4003, 752 N.Y.S.2d 13 (2002)
Affirmed by People v. Stuart, 2003 N.Y. LEXIS 1773 (N.Y., July 2, 2003)

**PRIOR HISTORY:** Appeal from a judgment of the Criminal Court of the City of New York, New York County, rendered August 2, 2000 after a nonjury trial (Neil E. Ross, J., on dismissal motion; A. Kirke Bartley, Jr., J., at trial and sentencing), convicting defendant of stalking in the fourth degree.

**DISPOSITION:** Affirmed.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** The Criminal Court, New York County, New York, convicted defendant of stalking in the fourth degree. Defendant appealed.

**OVERVIEW:** Defendant argued that the stalking statute, N.Y. Penal Law § 120.45, was unconstitutionally vague on the ground that the term "legitimate purpose" was subjective and incapable of precise definition. The appellate court held that defendant's argument ignored the fact that the statute measured defendant's actions by an objective standard, in that the offending course of conduct had to be such as would likely cause the targeted person to reasonably fear specified physical harm or actually caused the targeted person to suffer specified mental or emotional harm. The legislative use of inherently imprecise language did not render the statute fatally vague as the language conveyed a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Additionally, defendant could not advance theoretical applications of the term "legitimate purpose" which would have been outside the **stalking** statute's intended reach, such as the investigatory work of a **private detective.** The appellate court could not consider the possibility that the statute could have been vague as applied in other hypothetical situations.

**OUTCOME:** The judgment of the trial court was affirmed.

**CORE TERMS:** stalking, legitimate purpose, course of conduct, targeted, intentionally, requisite, vagueness, specific person, specific intent, reasonable fear, emotional harm, physical harm, stalker, void, discriminatory enforcement, unconstitutionally vague, sufficiently definite, common understanding, statutory language, conduct proscribed, proscribed conduct, uncomfortable, antistalking, unsolicited, conjunction, undertaken, encounter, stranger, measured, violator

**LexisNexis (TM) HEADNOTES - Core Concepts -** ✦ Hide Concepts

Criminal Law & Procedure > Criminal Offenses > Crimes Against the Person > Stalking & Intimidation

*HN1* See N.Y. Penal Law § 120.45.

Criminal Law & Procedure > Criminal Offenses > Crimes Against the Person > Stalking & Intimidation

*HN2* N.Y. Penal Law § 120.45 makes it unlawful to intentionally, and for no legitimate purpose, engage in a course of conduct directed at a specific person that would likely instill reasonable fear of material physical harm in the targeted person or that actually causes material mental or emotional harm to the targeted person where the violator knows or reasonably should know that such conduct would elicit the requisite fear or cause the requisite harm. More Like This Headnote

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*HN3* The stalking statute, N.Y. Penal Law § 120.45, measures a defendant's actions by an objective standard. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against the Person > Stalking & Intimidation
Governments > Legislation > Interpretation

conjunction with the rest of the statutory language, including the requirement that the course of conduct be undertaken intentionally, does not require a person of ordinary intelligence, law enforcement officials or triers of fact to guess at its meaning. More Like This Headnote

Governments > Legislation > Interpretation
Governments > Legislation > Overbreadth & Vagueness

*HN5* The legislative use of inherently imprecise language does not render a statute fatally vague where that language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. More Like This Headnote

Governments > Legislation > Interpretation
Governments > Legislation > Overbreadth & Vagueness

*HN6* The appellate court cannot consider the possibility that a statute may be vague as applied in other hypothetical situations. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against the Person > Stalking & Intimidation
Governments > Legislation > Overbreadth & Vagueness

*HN7* N.Y. Penal Law § 120.45 with its use of the phrase "legitimate purpose" in tandem with a general intent standard, parallels stalking statutes from other jurisdictions that have withstood constitutional vagueness challenges. More Like This Headnote

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**COUNSEL:**
*Legal Aid Society,* New York City (*Andrew C. Fine* and *Bryan Lonegan* of counsel), for appellant.

*Robert M. Morgenthau, District Attorney,* New York City (*Susan Gliner* and *Sylvia Wertheimer* of counsel), for respondent.

**JUDGES:** PRESENT: HON. WILLIAM J. DAVIS, J.P., HON. PHYLLIS GANGEL-JACOB, HON. LUCINDO SUAREZ, Justices. Davis, J.P., Gangel-Jacob and Suarez, JJ., concur.

**OPINION: [*542] [**767]**

PER CURIAM.

Judgment of conviction rendered August 2, 2000 (Neil E. Ross, J., on dismissal motion; A. Kirke Bartley, Jr., J., at trial and sentencing) affirmed.

Defendant Paul Stuart stands convicted, following a nonjury trial, of stalking in the fourth degree ( Penal Law § 120.45 [1], [2]). * The proof presented by the People, including the credited testimony **[***2]** of the complainant and an eyewitness, was strong and persuasive, and established the following facts: that on February 14 and February 26, 2000, defendant approached the then 21-year-old complainant, a stranger, and offered her unsolicited gifts, among them flowers and a box of chocolates; that during the February 26 encounter the complainant told defendant that she could not speak to him because she had a boyfriend; that later that day and on nearly every day for more than five weeks thereafter (through April 7, 2000), defendant "stared at" and followed the complainant throughout the area surrounding her home and school, often "lingering" or "circling around" the complainant and "ducking" into buildings or behind objects to avoid detection; and that as a result of defendant's unwanted and extended course of conduct the complainant felt "very scared" and "very uncomfortable." This evidence, viewed in the light most favorable to the prosecution, clearly was sufficient to support defendant's stalking conviction. In view of the persistent pattern of conduct painfully depicted **[*543]** in the record, the trial court, as factfinder, rationally and reasonably rejected defendant's **[***3]** proffered explanation that he unintentionally came into contact **[**768]** with the complainant while handing out flyers on behalf of his employer. Upon an independent review of the facts, we find that the verdict was not against the weight of the evidence.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* Subdivisions (1) and (2) of Penal Law § 120.45, part of New York's comprehensive antistalking legislation (L 1999, ch 635, § 1), read as follows:

HN1"A person is guilty of stalking in the fourth degree when he or she intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person, and knows or reasonably should know that such conduct:

"1. is likely to cause reasonable fear of material harm to the physical health, safety or property of such person ... or

"2. causes material harm to the mental or emotional health of such person, where such conduct consists of following, telephoning or initiating communication or contact with such person ... and the actor was previously clearly informed to cease that conduct."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[***4]**

Defendant's current claims that Penal Law § 120.45 is unconstitutionally vague, to the extent preserved for appellate review, are lacking in merit. HN2 The statute makes it unlawful to "intentionally, and for no legitimate purpose, engage[ ] in a course of conduct directed at a specific person" that would likely instill reasonable fear of material physical harm in the targeted person (subd [1]) or that actually causes material mental or emotional harm to the targeted person (subd [2]), where the violator knows or reasonably should know that such conduct would elicit the requisite fear or cause the requisite harm. The challenged subdivisions of the stalking statute thus provide sufficient notice of the conduct proscribed and are written in a manner that does not encourage arbitrary or discriminatory enforcement (*see, People v Shack,* 86 NY2d 529, 538; *People v Nelson,* 69 NY2d 302, 307; *Grayned v City of Rockford,* 408 US 104, 108-109; *United States v Harriss,* 347 US 612, 617).

In urging that the stalking statute is void for vagueness, defendant primarily argues that the term "legitimate **[***5]** purpose" is subjective and incapable of precise definition. Defendant's argument inappropriately lifts the statutory term out of context and ignores the fact that HN3 the statute measures a defendant's actions by an objective standard, in that the offending course of conduct must be such as would likely cause the targeted person to reasonably fear specified physical harm or actually causes the targeted person to suffer specified mental or emotional harm. In our view, HN4 the term "legitimate purpose," when read in conjunction with the rest of the statutory language, including the requirement that the course of conduct be undertaken "intentionally," does not require a person of ordinary intelligence, law enforcement officials or triers of fact to guess at its meaning. HN5 The legislative use of inherently imprecise language does not render a statute fatally vague where, as here, that language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices" (*People v Shack,* 86 NY2d 529, 538, *supra,* quoting *United States v Petrillo,* 332 US 1, 8). Further, it does not avail

which would be outside the **stalking [*544]** statute's intended reach, such as the investigatory work of a **private detective** or the collection efforts of a "repo man." The insidious actions of this defendant, a stranger to the complainant, were not remotely legitimate in purpose, and HN6 "this court cannot consider the possibility that the statute may be vague as applied in other hypothetical situations." (*People v Nelson,* 69 NY2d 302, 308, *supra.*)

Nor is Penal Law § 120.45 any more difficult to interpret and obey because it lacks a specific intent component. The Legislature's choice of general over specific intent reflects sound public policy and is consistent with the approach taken by the drafters of the national model antistalking statute (National Institute of Justice, *Project to Develop a Model Anti-stalking Code For States* 43-48 [1993]). By focusing on the behavior of the accused stalker rather than on the stalker's motivation, Penal Law § 120.45, like the model code, ensures that accused stalkers do not escape **[**769]** criminal liability "by saying **[***7]** that however outrageous [their] conduct might have been, it was not [their] actual intent to cause the requisite fear." (*New Jersey v Cardell,* 318 NJ Super 175, 184, 723 A2d 111, 115, *certification denied* 158 NJ 687, 731 A2d 46; *accord, Iowa v Neuzil,* 589 NW2d 708, 712 [Iowa]; *see also,* Greyson, Comment, *California's Antistalking Statute: The Pivotal Role of Intent,* 28 Golden Gate U L Rev 221, 242 [1998].) HN7 Indeed, Penal Law § 120.45, with its use of the phrase "legitimate purpose" in tandem with a general intent standard, parallels stalking statutes from other jurisdictions that have withstood constitutional vagueness challenges (*see, e.g., Bouters v Florida,* 659 So 2d 235 [Fla], *cert denied* 516 US 894; *Snowden v Delaware,* 677 A2d 33 [Del]; *People v White,* 536 NW2d 876 [Mich]; *cf., Oregon v Norris-Romine,* 134 Or App 204, 894 P2d 1221).

We have considered and rejected defendant's jurisdictional point (*see, People v Starkes,* 185 Misc 2d 186; *see also, People v Henderson,* 92 NY2d 677, 680-681). **[***8]**

Davis, J.P., Gangel-Jacob and Suarez, JJ., concur.

Source: Legal > Cases - U.S. > **Federal & State Cases, Combined**
Terms: stalk! and (investigator or detective) (Edit Search)
Focus: **stalk! w/25 (private w/5 investigator or detective)** (Exit FOCUS™)
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A

Source: Legal > States Legal - U.S. > Delaware > Statutes & Regulations > DE - Delaware Code Annotated
TOC: Delaware Code Annotated > /.../ > SUBPART A. RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES > § 1312A. Stalking; class F felony
Terms: stalking and private detectives (Edit Search)

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*11 Del. C. § 1312A*



TITLE 11. CRIMES AND CRIMINAL PROCEDURE
PART I. DELAWARE CRIMINAL CODE
CHAPTER 5. SPECIFIC OFFENSES
SUBCHAPTER VII. OFFENSES AGAINST PUBLIC HEALTH, ORDER AND DECENCY
*SUBPART A. RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES*

• **GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

11 Del. C. § 1312A (2003)

**STATUS: CONSULT SLIP LAWS CITED BELOW FOR RECENT CHANGES TO THIS DOCUMENT**
• LEXSEE 2003 Del. ALS 116 -- See sections 1 and 2.

§ 1312A. **Stalking;** class F felony

(a) Any person who intentionally engages in a course of conduct directed at a specific person which would cause a reasonable person to fear physical injury to himself or herself, to a friend or associate, or to a member of his or her household or to a third person and whose conduct induces such fear in such person, is guilty of the crime of **stalking.**

(b) For the purposes of this section, the following definitions are provided:

(1) "Course of conduct" includes repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct, or repeatedly committing any acts constituting any criminal offense as defined by the Delaware Code, or a combination thereof, and which reflects a continuity of purpose. A conviction is not required for any predicate act relied upon to establish a course of conduct. A conviction for any predicated act relied upon to establish a course of conduct does not preclude prosecution under this section. Prosecution under this section does not preclude prosecution under any other section of the Code.

(2) "Repeatedly" means more than 3 occasions.

(c) In any prosecution under this section, it is an affirmative defense that the person charged was engaged in lawful picketing.

(d) This section shall not apply to conduct which occurs in furtherance of legitimate law enforcement activities or to private investigators, security officers or **private detectives** as

those activities are defined in Chapter 13 of Title 24.

(e) **Stalking** is a class F felony, unless the course of conduct includes a threat of death or serious physical injury to the victim, his or her immediate family or to a third person, in which case it is a class D felony; or, unless the perpetrator possesses a deadly weapon during any act comprising the course of conduct, in which case it is a class C felony.

(f) Notwithstanding any contrary provision of § 4205 of this title, any person who commits the crime of **stalking** by engaging in a course of conduct which includes any act or acts which have previously been prohibited by a then-existing court order or sentence shall receive a minimum sentence of 6 months incarceration at Level V. The first 6 months of said period of incarceration shall not be subject to suspension.

(g) Notwithstanding any contrary provision of § 4205 of this title, any person who is convicted of **stalking** within 5 years of a prior conviction of **stalking** shall receive a minimum sentence of 1 year incarceration at Level V. The 1st year of said period of incarceration shall not be subject to suspension.

**HISTORY:** 68 Del. Laws, c. 250, § 1; 70 Del. Laws, c. 186, § 1; 70 Del. Laws, c. 316, § 1.

CONSTITUTIONALITY OF SECTION. --This section is not unconstitutionally vague, and does not unconstitutionally restrict the right to travel. Snowden v. State, Del. Supr., 677 A.2d 33 (1996).

This section is not unconstitutional on its face with regards to conduct not covered by subsection (c) even though lawful labor picketing is specifically exempted from this section on the basis of its content. McDade v. State, Del. Supr., 693 A.2d 1062 (1997).

SAVINGS PROVISION IN AMENDED SECTION. --There is an implied savings provision in the legislation that amended this section in 1996; thus, a defendant charged with committing the crime of **stalking** under the old statute in effect at the time of the alleged crime may be convicted under the old statute even though the amending legislation that created the new statute did not include an express savings clause. Williams v. State, Del. Supr., 756 A.2d 349 (2000).

CONSTRUCTION OF SECTION. --This section has only one logical reading, namely that "repeatedly" modifies "follows" and not "harasses"; repeated following is an element of **stalking,** and harassing is an alternative element. Snowden v. State, Del. Supr., 677 A.2d 33 (1996).

PROOF OF HARASSMENT REQUIRED. --When the State charges defendant by information under the "harassment" prong of this section and not the alternative "following" prong, the State must prove harassment. Snowden v. State, Del. Supr., 677 A.2d 33 (1996).

EVIDENCE OF PRIOR CONVICTION. --Evidence of prior **stalking** conviction held to be highly probative on the issue of whether defendant's subsequent **stalking** actions were accidental. Snowden v. State, Del. Supr., 677 A.2d 33 (1996).

LACK OF INSTRUCTION ON LESSER OFFENSE OF HARASSMENT FOUND PREJUDICIAL. -- Defendant's conviction was reversed where there was evidence to support an acquittal on the **stalking** charge and a conviction on the lesser offense of harassment, but the jury was not properly instructed on harassment. Burnham v. State, Del. Supr., 761 A.2d 830 (2000).

INSTRUCTIONS ON ALTERNATE GROUNDS HELD NOT PREJUDICIAL. --Although the evidence at trial supported only one of the two possible alternative grounds for conviction

under this section, the court did not commit reversible error by including both grounds in the jury instructions. As the prosecution argued only one ground for conviction in its closing arguments, the additional language read to the jury was unnecessary but not prejudicial. McDade v. State, Del. Supr., 693 A.2d 1062 (1997).

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, subchapter, chapter, part or title.

Source: Legal > States Legal - U.S. > North Dakota > Statutes & Regulations > ND - North Dakota Century Code, Constitution, Court Rules & ALS, Combined
TOC: North Dakota Century Code > /.../ > CHAPTER 12.1-17. ASSAULTS--THREATS--COERCION--HARASSMENT > § 12.1-17-07.1. Stalking
Terms: stalking and private investigator (Edit Search)

*N.D. Cent. Code, § 12.1-17-07.1*



*** STATUTES CURRENT THROUGH THE 2003 GENERAL AND SPECIAL SESSIONS. ***
*** ANNOTATIONS CURRENT THROUGH JULY 25, 2003. ***

TITLE 12.1. CRIMINAL CODE
CHAPTER 12.1-17. ASSAULTS--THREATS--COERCION--HARASSMENT

◆ GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

N.D. Cent. Code, § 12.1-17-07.1 (2003)

§ 12.1-17-07.1. **Stalking**

1. As used in this section:

a. "Course of conduct" means a pattern of conduct consisting of two or more acts evidencing a continuity of purpose. The term does not include constitutionally protected activity.

b. "Immediate family" means a spouse, parent, child, or sibling. The term also includes any other individual who regularly resides in the household or who within the prior six months regularly resided in the household.

c. "Stalk" means to engage in an intentional course of conduct directed at a specific person which frightens, intimidates, or harasses that person, and that serves no legitimate purpose. The course of conduct may be directed toward that person or a member of that person's immediate family and must cause a reasonable person to experience fear, intimidation, or harassment.

2. No person may intentionally stalk another person.

3. In any prosecution under this section, it is not a defense that the actor was not given actual notice that the person did not want the actor to contact or follow the person; nor is it a defense that the actor did not intend to frighten, intimidate, or harass the person. An attempt to contact or follow a person after being given actual notice that the person does not want to be contacted or followed is prima facie evidence that the actor intends to stalk that person.

4. In any prosecution under this section, it is a defense that a **private investigator** licensed under chapter 43-30 or a peace officer licensed under chapter 12-63 was acting within the scope of employment.

5. If a person claims to have been engaged in a constitutionally protected activity, the court shall determine the validity of the claim as a matter of law and, if found valid, shall exclude evidence of the activity.

6. a. A person who violates this section is guilty of a class C felony if:

(1) The person previously has been convicted of violating section 12.1-17-01, 12.1-17-01.1, 12.1-17-02, 12.1-17-04, 12.1-17-05, or 12.1-17-07 or a similar offense in another state, involving the victim of the **stalking;**

(2) The **stalking** violates a court order issued under chapter 14-07.1 protecting the victim of the **stalking,** if the person had notice of the court order; or

(3) The person previously has been convicted of violating this section.

b. If subdivision a does not apply, a person who violates this section is guilty of a class A misdemeanor.

**HISTORY:** SOURCE: S.L. 1993, ch. 120, § 1; 1995, ch. 126, § 1.

DOMESTIC VIOLENCE PROTECTIVE ORDER.
State's failure to comply with section 14-07.1-03.1, by failing to include a copy of this section with an order issued under sections 14-07.1-02 or 14-07.1-03, does not deprive the trial court of jurisdiction to hear the charge against one accused of violating a domestic violence protection order; however dismissal might be appropriate if actual prejudice is shown. State v. Sundquist, 542 N.W.2d 90 (N.D. 1996).

EVIDENCE SUFFICIENT.
Evidence was sufficient to convict defendant under this section, where his wife, who had obtained protective order, testified defendant called her about twenty times and made personal contact on three separate occasions when he was not accompanied by a peace officer. State v. Keller, 550 N.W.2d 411 (N.D. 1996).

COLLATERAL REFERENCES.
Validity, construction, and application of **stalking** statutes, 29 A.L.R.5th 487.

LAW REVIEWS.
North Dakota's **Stalking** Law: Criminalizing the Crime Before the Crime, 70 N.D. L. Rev. 159 (1994).

Source: Legal > States Legal - U.S. > Washington > Statutes & Regulations > **WA - Annotated Revised Code of Washington, Constitution, Court Rules & ALS, Comb**
TOC: Annotated Revised Code of Washington > /.../ > CHAPTER 9A.46. HARASSMENT > **§ 9A.46.110. Stalking**
Terms: **stalking and private investigator** (Edit Search)

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*Rev. Code Wash. (ARCW) § 9A.46.110*



*** (STATUTES CURRENT THROUGH THE 2002 GENERAL ELECTION(2003 CH 2)) ***
*** (ANNOTATIONS CURRENT THROUGH MAY 23 2003) ***

TITLE 9A. WASHINGTON CRIMINAL CODE
CHAPTER 9A.46. HARASSMENT

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Rev. Code Wash. (ARCW) § 9A.46.110 (2003)

**STATUS: CONSULT SLIP LAWS CITED BELOW FOR RECENT CHANGES TO THIS DOCUMENT**
LEXSEE 2003 Wa. SB 5758 -- See section 70.

§ 9A.46.110. **Stalking**

(1) A person commits the crime of **stalking** if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

(2) (a) It is not a defense to the crime of **stalking** under subsection (1)(c)(i) of this section that the stalker was not given actual notice that the person did not want the stalker to contact or follow the person; and

(b) It is not a defense to the crime of **stalking** under subsection (1)(c)(ii) of this section that the stalker did not intend to frighten, intimidate, or harass the person.

(3) It shall be a defense to the crime of **stalking** that the defendant is a licensed **private investigator** acting within the capacity of his or her license as provided by chapter 18.165 RCW.

(4) Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person. "Contact" includes, in addition to any other form of contact or communication, the sending of an electronic communication to the person.

(5) A person who stalks another person is guilty of a gross misdemeanor except that the person is guilty of a class C felony if any of the following applies: (a) The stalker has previously been convicted in this state or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a protective order; (b) the **stalking** violates any protective order protecting the person being stalked; (c) the stalker has previously been convicted of a gross misdemeanor or felony **stalking** offense under this section for **stalking** another person; (d) the stalker was armed with a deadly weapon, as defined in *RCW 9.94A.602, while **stalking** the person; (e) the stalker's victim is or was a law enforcement officer, judge, juror, attorney, victim advocate, legislator, or community correction's officer, and the stalker stalked the victim to retaliate against the victim for an act the victim performed during the course of official duties or to influence the victim's performance of official duties; or (f) the stalker's victim is a current, former, or prospective witness in an adjudicative proceeding, and the stalker stalked the victim to retaliate against the victim as a result of the victim's testimony or potential testimony.

(6) As used in this section:

(a) "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another.

(b) "Harasses" means unlawful harassment as defined in RCW 10.14.020.

(c) "Protective order" means any temporary or permanent court order prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person.

(d) "Repeatedly" means on two or more separate occasions.

**HISTORY:** 1999 c 143 § 35; 1999 c 27 § 3; 1994 c 271 § 801; 1992 c 186 § 1.

**NOTES:**
REVISER'S NOTE: *(1) This RCW reference has been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.
(2) This section was amended by 1999 c 27 § 3 and by 1999 c 143 § 35, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

INTENT -- 1999 C 27: See note following RCW 9A.46.020.

PURPOSE -- SEVERABILITY -- 1994 C 271: See notes following RCW 9A.28.020.

SEVERABILITY -- 1992 C 186: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1992 c 186 § 10.]

EFFECT OF AMENDMENTS.
1999 c 143 § 35, effective July 25, 1999, substituted " **private investigator**" for " private detective" in (3).
1999 c 27 § 3, effective July 25, 1999, substituted "investigator" for "detective" in (3); and added the last sentence in (4).

JUDICIAL DECISIONS

ANALYSIS
Constitutionality.
--Due process
--Equal protection
Evidence
Felony

CONSTITUTIONALITY..
Where, a person of ordinary understanding would be capable of determining that defendant's conduct constituted repeated "following" within the definition in this section, the definition is not unconstitutionally vague as applied. State v. Ainslie, 103 Wn. App. 1, 11 P.3d 318 (2000).
This section is not void for vagueness, is not unconstitutionally overbroad, and does not violate constitutional requirements of due process. State v. Lee, 135 Wn.2d 369, 957 P.2d 741 (1998).
This section is not unconstitutionally overbroad nor unconstitutionally vague. State v. Lee, 82 Wn. App. 298, 917 P.2d 159 (1996), aff'd, 135 Wn.2d 369, 957 P.2d 741 (1998).

--DUE PROCESS.
This section does not violate procedural due process; the prohibition of **stalking** does not intrude on any substantial private interest, and the risk of erroneous deprivation of liberty is minimal since the section can only be enforced upon a showing that the defendant's behavior was intentional and provoked a reasonable sense of fear. State v. Lee, 82 Wn. App. 298, 917 P.2d 159 (1996), aff'd, 135 Wn.2d 369, 957 P.2d 741 (1998).

--EQUAL PROTECTION.
This section does not violate equal protection by creating a special allowance for private detectives; the statutory distinction has a rational basis in that these individuals pose little threat of harm to the people they follow. State v. Lee, 82 Wn. App. 298, 917 P.2d 159 (1996), aff'd, 135 Wn.2d 369, 957 P.2d 741 (1998).

EVIDENCE.
There was sufficient evidence to support defendants' convictions under this section; defendant did not have lawful authority to follow the victims, and the victims, reasonably, were placed in fear by defendants' ongoing conduct. State v. Lee, 82 Wn. App. 298, 917 P.2d 159 (1996), aff'd, 135 Wn.2d 369, 957 P.2d 741 (1998).

FELONY.
Because **stalking** requires a finding of repeated harassment or repeated following, a felony conviction under Paragraph (5)(b) must be supported by proof of at least two

violations of a protective order. State v. Parmelee, 108 Wn. App. 702, 32 P.3d 1029 (2001).

RESEARCH REFERENCES

WASHINGTON LAW REVIEW.
Lifesaving legislation: but will the Washington **stalking** law survive constitutional scrutiny? 72 Wash. L. Rev. 213 (1997).

ALR.
Validity, construction, and application of **stalking** statutes. 29 ALR5th 487.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.

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*NRS § 200.575*



TITLE 15. CRIMES AND PUNISHMENTS
CHAPTER 200. CRIMES AGAINST THE PERSON
HARASSMENT AND **STALKING**

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NRS § 200.575 (2003)

**STATUS: CONSULT SLIP LAWS CITED BELOW FOR RECENT CHANGES TO THIS DOCUMENT**

LEXSEE 2003 Nev. ALS 2 -- See section 2.

§ 200.575. **Stalking:** Definitions; penalties

1. A person who, without lawful authority, willfully or maliciously engages in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated or harassed, and that actually causes the victim to feel terrorized, frightened, intimidated or harassed, commits the crime of **stalking.** Except where the provisions of subsection 2 are applicable, a person who commits the crime of **stalking:**

(a) For the first offense, is guilty of a misdemeanor.

(b) For any subsequent offense, is guilty of a gross misdemeanor.

2. A person who commits the crime of **stalking** and in conjunction therewith threatens the person with the intent to cause him to be placed in reasonable fear of death or substantial bodily harm commits the crime of aggravated **stalking.** A person who commits the crime of aggravated **stalking** shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $ 5,000.

3. A person who commits the crime of **stalking** with the use of an Internet or network site or electronic mail or any other similar means of communication to publish, display or distribute information in a manner that substantially increases the risk of harm or violence to the victim shall be punished for a category C felony as provided in NRS 193.130.

4. Except as otherwise provided in subsection 2 of NRS 200.571, a criminal penalty provided for in this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for any contempt of court arising from the same conduct.

5. The penalties provided in this section do not preclude the victim from seeking any other legal remedy available.

6. As used in this section:

(a) "Course of conduct" means a pattern of conduct which consists of a series of acts over time that evidences a continuity of purpose directed at a specific person.

(b) "Internet or network site" has the meaning ascribed to it in NRS 205.4744.

(c) "Network" has the meaning ascribed to it in NRS 205.4745.

(d) "Provider of Internet service" has the meaning ascribed to it in NRS 205.4758.

(e) "Without lawful authority" includes acts which are initiated or continued without the victim's consent. The term does not include acts which are otherwise protected or authorized by constitutional or statutory law, regulation or order of a court of competent jurisdiction, including, but not limited to:

(1) Picketing which occurs during a strike, work stoppage or any other labor dispute.

(2) The activities of a reporter, photographer, cameraman or other person while gathering information for communication to the public if that person is **employed** or engaged by or has contracted with a newspaper, periodical, press association or radio or television station and is acting solely within that professional capacity.

(3) The activities of a person that are carried out in the normal course of his lawful **employment.**

(4) Any activities carried out in the exercise of the constitutionally protected rights of freedom of speech and assembly.

**HISTORY:** 1993, ch. 233, § 1, p. 509; 1995, ch. 50, § 4, p. 59; 1995, ch. 443, §§ 73, 377, pp. 1195, 1324; 1999, ch. 333, § 1, p. 1377; 2001, ch. 123, § 2, p. 665; 2001, ch. 560, §§ 3, 28, pp. 2785, 2800.

**NOTES:**
EDITOR'S NOTE. --Acts 1995, ch. 443, § 393, provides: "The amendatory provisions of sections 1 to 230, inclusive, and 232 to 374, inclusive, of this act do not apply to offenses which are committed before July 1, 1995."

Acts 2001, ch. 123, § 4, states that the amendatory provisions of this act do not apply to offenses committed before October 1, 2001.

Acts 2001, ch. 560, § 29, makes the amendatory provisions of the act inapplicable to offenses committed before its effective date.

This section was amended by two 2001 acts which do not appear to conflict and have been compiled together.

Subsequent to the 2001 legislative session, the Legislative Counsel changed a reference in subdivision 6(d) from "205.4748" to "205.4758."

EFFECTIVE DATE. --The 1999 amendment is effective May 28, 1999.

EFFECT OF AMENDMENT. --The 1999 amendment, in subdivisions 3(a) and 3(b)(2), substituted "2 years" for "1 year," and substituted "15 years" for "6 years."

The 2001 amendment by ch. 123, § 2, effective October 1, 2001, as amended by ch. 560, § 28, effective June 13, 2001, rewrote former subsections 2 and 4 as subsection 2, deleting the provisions pertaining to **stalking** a spouse or person with whom one has a child in common during the pendency of a domestic relations trial and the penalties for such; redesignated former subsections 5 to 7 as subsections 4 to 6; and made related changes.

The 2001 amendment by ch. 560, § 3, effective June 13, 2001, added subsection 3, and redesignated the remaining subsections accordingly; added subdivisions 6(b) to (d), and redesignated former subdivision 6(b) as subdivision 6(e); and updated an internal reference in subsection 1.

CROSS REFERENCES. --As to restricting the use of computers or internet as terms of probation in internet **stalking** cases, see NRS 176A.413. As to restricting the use of computers and internet as a condition of parole, see NRS 213.1258.

CASE NOTES

NECESSARY ELEMENT. --The court prejudicially erred in failing to instruct the jury that a necessary element of aggravated **stalking** is that the defendant must have threatened the victim. Rossana v. State, 113 Nev. 375, 934 P.2d 1045 (1997).

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*Tenn. Code Ann. § 39-17-315*



*** CURRENT THROUGH THE 2003 SESSION ***
*** ANNOTATIONS CURRENT THROUGH MAY 30, 2003 ***

TITLE 39. CRIMINAL OFFENSES
CHAPTER 17. OFFENSES AGAINST PUBLIC HEALTH, SAFETY AND WELFARE
PART 3. DISORDERLY CONDUCT AND RIOTS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Tenn. Code Ann. § 39-17-315 (2003)

39-17-315. **Stalking**

(a) (1) A person commits the offense of **stalking** who intentionally and repeatedly follows or harasses another person in such a manner as would cause that person to be in reasonable fear of being assaulted, suffering bodily injury or death.

(2) As used in this section:

(A) "Follows" means maintaining a visual or physical proximity over a period of time to a specific person in such a manner as would cause a reasonable person to have a fear of an assault, bodily injury or death;

(B) "Harasses" means a course of conduct directed at a specific person which would cause a reasonable person to fear an assault, bodily injury, or death, including, but not limited to, verbal threats, written threats, vandalism, or unconsented-to physical contact; and

(C) "Repeatedly" means on two (2) or more separate occasions.

(b) (1) **Stalking** is a Class A misdemeanor.

(2) A second or subsequent violation of subsection (a) occurring within seven (7) years of the prior conviction is a Class E felony. A second or subsequent violation of subsection (a) involving the same victim and occurring within seven (7) years of the prior conviction is a Class C felony.

(c) The provisions of this section shall not be construed to prohibit following another person during the course of a lawful **business** activity.

**HISTORY:** Acts 1992, ch. 795, § 1; 1993, ch. 435, § 1; 1995, ch. 378, § 1.

**NOTES:**
CROSS-REFERENCES. Penalty for Class A misdemeanor, § 40-35-111.
Penalties for Class C and E felonies, § 40-35-111.

SECTION TO SECTION REFERENCES. This section is referred to in §§ 20-14-101, 36-3-606, 40-38-111.

NOTES TO DECISIONS

LAW REVIEWS. Note, The Nature and Constitutionality of **Stalking** Laws, 46 Vand. L. Rev. 991 (1993). State v. Gieck, 29 S.W.3d 57 (Tenn. Crim. App. 1999); Miltier v. Miltier, 31 S.W.3d 583 (Tenn. Ct. App. 2000); State v. Jennings, -- S.W.3d -- (Tenn. Crim. App. Apr. 16, 2003).

ANALYSIS

1. Elements of offense.
2. Double jeopardy.
3. Sufficiency of evidence.

1. ELEMENTS OF OFFENSE.
Allowing proof of numerous incidents of telephone harassment and **stalking** did not compromise constitutional right to unanimous jury verdict since both offenses require proof of continuous course of conduct. State v. Hoxie, 963 S.W.2d 737 (Tenn. 1998).

2. DOUBLE JEOPARDY.
Double Jeopardy Clause protects a defendant from being punished for multiple counts of **stalking** for actions, although separate, that constitute only one offense of **stalking.** State v. Vigil, 65 S.W.3d 26 (Tenn. Crim. App. 2001).

3. SUFFICIENCY OF EVIDENCE.
Sufficient evidence existed to convict defendant of **stalking,** as defendant repeatedly drove by the victim's house, watched him play basketball, and repeatedly maintained a visual and physical proximity to the victim and the victim reasonably feared being assaulted by him. State v. Duty, -- S.W.3d -- (Tenn. Crim. App. Nov. 13, 2002).

COLLATERAL REFERENCES. Validity, construction, and application of **stalking** statutes. 29 A.L.R.5th 487.
Extortion and threats Key 165.25.